No. 06-1456
Title: Humberto Fidel Regalado Cuellar, Petitioner
v.
United States
Docketed: May 4, 2007
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (05-10065)
Decision Date: February 2, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
May 3 2007	Petition for a writ of certiorari filed. (Response due June 4, 2007)
May 30 2007	Order extending time to file response to petition to and including July 5, 2007.
Jun 26 2007	Order further extending time to file response to petition to and including August 3, 2007.
Aug 3 2007	Brief of respondent United States in opposition filed.
Aug 3 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Aug 14 2007	Reply of petitioner Humbarto Fidel Regalado Cuellar filed. (Distributed)
Aug 15 2007	DISTRIBUTED for Conference of September 24, 2007.
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Oct 15 2007	Petition GRANTED.
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Nov 14 2007	Record received from U.S. District Court for the Northern District of Texas. (San Angelo Division) (1 envelope) (There are sealed documents in this record)
Nov 27 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 7, 2007.
Nov 27 2007	The time within which to file respondent's brief on the merits is extended to and including January 16, 2008.
Dec 7 2007	Joint appendix filed. (Statement of costs filed)
Dec 7 2007	Brief of petitioner Humberto Fidel Regalado Cuellar filed.
Dec 14 2007	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 21 2007	SET FOR ARGUMENT ON Monday, February 25, 2008.
Jan 16 2008	Brief of respondent United States filed.
Jan 18 2008	CIRCULATED.
Feb 15 2008	Reply of petitioner Humberto Fidel Regalado Cuellar filed. (Distributed)
Feb 25 2008	Argued. For petitioner: Jerry V. Beard, Assistant Federal Public Defender, Fort Worth, Tex. For respondent: Lisa H. Schertler, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

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No. 06-

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction.

PARTIES TO THE PROCEEDING

Petitioner is Humberto Fidel Regalado Cuellar, defendant-appellant below.

Respondent is the United States of America, plaintiff-appellee below.

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OTHER AUTHORITIES

The American Heritage Dictionary Of The English Language
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Black's Law Dictionary
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Investigating Money Laundering and Terrorist Financing: Testimony Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) (May 11, 2004), *available at* http://www.gao.gov/new.items/d04710t.pdf. 8-9

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Humberto Fidel Regalado Cuellar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The en banc court of appeals decision is reported at 478 F.3d 282 and is reprinted in the Appendix to the Petition ("App.") at 1a-44a. The panel decision is reported at 441 F.3d 329 and is reprinted at App. 45a-56a. The district court's judgment is unreported and is reprinted at App. 57a-62a.

JURISDICTION

The en banc court of appeals issued its decision on February 2, 2007. App. 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. 63a-74a.

STATEMENT OF THE CASE

This case involves legal uncertainty about the scope of the principal federal money laundering statute, 18 U.S.C. § 1956. Petitioner was arrested while traveling towards Mexico with a large sum of cash hidden in the car. App. 45a. He was convicted of money laundering. *Id.* A divided panel of the Fifth Circuit, per Judge Smith, reversed the conviction because "the government failed to prove the necessary design to conceal" – petitioner "was not trying to 'create the appearance of legitimate wealth' by smuggling drug money across the border.'" *Id.* at 52a. The dissenting judge argued that petitioner's "hiding" of the funds sufficed, and stated that "the Second and Third Circuits dealing with fac-

tual situations substantially similar to these have found this concealment element satisfied." *Id.* at 56a.

The Fifth Circuit granted en banc review. Affirming the conviction, the en banc court noted that petitioner had taken various steps to hide the money, rejected the view that money laundering requires a design to create the appearance of legitimate wealth, and expressly aligned the Fifth Circuit with the view of the Second and Third Circuits. *Id.* at 11a-13a. Now in dissent, Judge Smith observed that there is a "circuit split" on whether the money laundering "statute requires a design to create the appearance of legitimate wealth." *Id.* at 38a-39a.

1. The principal federal money laundering statute, 18 U.S.C. § 1956(a), has separate transaction and transportation paragraphs. The transaction money laundering provision, Section 1956(a)(1), makes it a crime to, among other things, engage in "a financial transaction" with "the proceeds of some form of unlawful activity" "knowing that the transaction is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B). Similarly, the transportation money laundering provision, Section 1956(a)(2), makes it a crime to transport "from a place in the United States to or through a place outside the United States" "the proceeds of some form of unlawful activity" "knowing that such transportation" "is designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(2)(B). Violation of either provision is punishable by twenty years imprisonment.

2. In July 2004, Petitioner Humberto Cuellar was travelling south on State Highway 77 in Texas, approximately one hundred miles from the Mexican border. App. 2a. A police officer from the Schleicher County Sheriff's Department

stopped Cuellar, apparently because his car was travelling slowly and had swerved onto the shoulder. *Id.* A translator and a drug- detecting dog were requested. *Id.* at 2a-3a. Ultimately, the "officers found a hidden compartment underneath the floorboard containing $83,000 wrapped in duct tape bundles inside blue Walmart sacks and marked with a Sharpie as to the amounts in each bundle." *Id.* at 4a.

Cuellar was convicted at trial of international money laundering. App. 6a-7a. He was not charged with bulk cash smuggling. *Id.* at 30a, n.10. Cuellar was sentenced to 78 months imprisonment and three years supervised release, eighteen months more prison time than the maximum punishment available under the bulk cash smuggling statute. Pet'r C.A. Brief at 4.

3. The Court of Appeals (Davis, Smith, Dennis, JJ.) reversed Cuellar's conviction and rendered a judgment of acquittal. App. 45a-46a. The panel began by finding that a "reasonable trier of fact could have concluded that the money hidden in the car was proceeds of drug trafficking and that Cuellar knew that." *Id.* at 49a. For a money laundering conviction, however, the court also "ask[s] whether Cuellar's transportation of the money was designed in whole or in part to conceal or disguise its nature, location, source, ownership or control and whether Cuellar knew that." *Id.* at 49a-50a. The panel noted the government's view that "it had proven this element merely by showing that the money was hidden in Cuellar's car." *Id.* at 50a. ("Throughout the trial, the government focused its attention on establishing that the money was most likely drug proceeds, essentially overlooking the equally important concealment prong."). But, the panel explained, Fifth Circuit precedent on the meaning of concealment in the transaction money laundering provision was equally applicable under the international transportation provision. *Id.* at 50a n.4. And that precedent required the government to show that the defendant's activities were de-

signed to "*create the appearance of legitimate wealth.*" *Id.* at 51a (citation omitted). Cuellar, the panel held, "was not trying to 'create the appearance of legitimate wealth' by smuggling drug money across the border" and thus could not be convicted of money laundering. *Id.* at 52a. The panel noted, however, "that the government may be able to make a case against Cuellar for bulk cash smuggling under 31 U.S.C. § 5332(a)." *Id.* at 52a n.5.

Judge Davis dissented. In his view, evidence that Cuellar "purposefully concealed drug proceeds and was transporting them to Mexico in a manner consistent with drug trafficking patterns for the region" was sufficient to convict him of money laundering. App. 55a. He noted that "[o]ther circuits have found on facts similar to ours that the government established the concealment prong of the money laundering statute." *Id.* at 54a. See also *Id.* at 56a ("[T]he Second and Third Circuits dealing with factual situations substantially similar to these have found this concealment element satisfied.").

The Fifth Circuit granted the government's petition for rehearing, vacated the panel opinion, and affirmed the conviction. *Id.* at 1a-2a. In upholding Cuellar's conviction, the en banc court expressly rejected the panel's view that a money laundering conviction "requires proof that the defendant's acts created the appearance of legitimate wealth." *Id.* at 12a. The court noted that the "Second Circuit in *United States v. Ness*, 466 F.3d 79 (2d Cir. 2006), expressly rejected this argument and the panel's position on this issue." *Id.* According to the en banc court, "although creating the appearance of legitimate wealth is one way of concealing illicit funds, it is not the only way concealment can be established." *Id.* And, in the en banc court's opinion, "Congress chose the broad, unqualified word 'conceal'" and thus "[i]t makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way." *Id.*

In addition to the Second Circuit, the en banc court aligned itself with the Third Circuit, *see United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994), and the Eleventh Circuit, *see United States v. Johnson*, 440 F.3d 1286 (11th Cir. 2006). *Id.* at 13a, 15a.

Judges Smith, DeMoss and Dennis dissented. The dissent noted a "circuit split" as to whether "the statute requires a design to create the appearance of legitimate wealth." App. 38a-39a. In explaining why a money laundering conviction requires proof of a design to create the appearance of legitimate wealth, the dissent pointed to the statutory title, *id.* at 25a-27a, the legislative history, *id.* at 27a-31a, the rule of lenity, *id.* at 31a-32a, the canon against absurdities, *id.* at 32a-35a, and case law from other circuits, *id.* at 35a-39a. The dissent noted that "Cuellar likely committed a serious violation of the United States Code, but not of the section of which he was convicted." *Id.* at 44a. The dissent closed with a "call upon the Attorney General to confess error in this case of prosecutorial excess." *Id.*[1]

REASONS FOR GRANTING THE PETITION

This case presents a question of statutory interpretation involving the principal federal money laundering statute (18 U.S.C. § 1956) on which the circuits are deeply divided: Whether the money laundering statute requires a design to "conceal or disguise" funds for the purpose of creating the

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[1] Judge Smith, joined by Judge DeMoss, also authored an introductory section to the dissent observing that "[t]his is a case of a prosecution run amok." App. 22a. It noted that "instead of charging under a statute of which Cuellar (by his attorney's admission) is guilty, the government used the wrong law, and the majority has now blessed the government's missteps with a holding that makes 'money laundering' out of virtually any transfer of illicit proceeds across an international border." *Id.* at 23a. The dissent stated that the "majority ignores common sense, context, and accepted principles of statutory interpretation to reach an ultimately absurd and embarrassing result." *Id.* The dissent "decline[d] to rewrite the law judicially" in this way. *Id.*

appearance of legitimate wealth. The Sixth, Seventh, and Tenth Circuits require a design to create the appearance of legitimate wealth. In the decision below, the en banc Fifth Circuit joined the Second, Third and Eleventh Circuits in concluding just the opposite – *i.e.*, that a defendant's mere hiding of funds is sufficient to support a money laundering conviction and that no evidence of a design to create the appearance of legitimate wealth is required.

A circuit split on the substantive scope of the money laundering statute warrants this Court's review. This case presents a statutory interpretation question that is distinct but complementary to the question presented in the recently granted case, *United States v. Santos*, No. 06-1005 (cert. granted April 23, 2007). In *Santos*, the Court has agreed to resolve a circuit split as to whether "proceeds" as used in the principal federal money laundering statute, 18 U.S.C. § 1956, refers to "gross receipts" or "profits." In urging this Court to grant review, the Solicitor General of the United States wrote:

> This Court should grant review to resolve the conflict among the courts of appeals on the meaning of the money laundering statute. *A circuit conflict is particularly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute.* It is not acceptable for conduct to be money laundering in Boston and Philadelphia but not in Chicago.

Santos Gov't Pet. in No. 06-1005, at 25-26 (emphasis added). Just as the circuit split on the meaning of "proceeds" warrants review, so too the circuit split on the meaning of "conceal or disguise" warrants this Court's review.

A. The En Banc Court of Appeals Decision Incorrectly Expands The Scope of The Money Laundering Statute

Contrary to the holding of the en banc court below, the federal crime of money laundering requires the government to prove that the defendant concealed or disguised funds to create the appearance of legitimate wealth. There are countless methods by which a criminal may attempt to "launder" illegal proceeds and thereby profit from the crime. The criminal might disguise drug money as legitimate money by creating a fake business scheme that disguises the true nature of the money, or may create shell companies that disguise the true location or ownership of the funds. These methods for laundering proceeds are varied and numerous, but they are all captured by the Congressional prohibition of "conceal[ing] or disguis[ing]" the various attributes of the proceeds: their "nature," "location," "source," "ownership," or "control." 18 U.S.C. § 1956(a)(2)(B)(i).

The crime at issue here is "money laundering," as reflected in the title of the statute, "Laundering of monetary instruments." 18 U.S.C. § 1956. As a matter of plain English, to "launder" money "is to disguise illegally-obtained money by making it appear legitimate." App. 26a, *citing* 8 *Oxford English Dictionary* 702 (2d ed. 1989) (to launder money is "to transfer funds of dubious or illegal origin, usually to a foreign country, and then later to recover them from what seem to be 'clean' sources"); *The American Heritage Dictionary Of The English Language* 992 (4th ed. Houghton Mifflin Co. 2006) (to launder money is "to disguise the source or nature of (illegal funds, for example) by channeling through an intermediate agent"); *The New Oxford American Dictionary* 958 (2d ed. Oxford Univ. Press 2005) (to launder money is to "conceal the origins of (money obtained illegally) by transfers involving foreign banks or legitimate businesses"). *See also Black's Law Dictionary* 1027 (8th ed.

2004) (to launder money is "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced").

Law enforcement agencies also define money laundering as creating the appearance of legitimate wealth. The influential President's Commission on Organized Crime, which spearheaded the legislative effort to enact the current money laundering statute, defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, *and then disguises that income* to make it appear legitimate." President's Comm'n On Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, And Money Laundering* 7 (Books for Bus. 2001) (1985) (emphasis added).[2] Similarly, the General Accounting Office defines money laundering as "the process of disguising or concealing illicit funds to make them appear legitimate." General Accounting Office, *Investigating Money Laundering and Terrorist Financing: Testimony Before the H. Subcomm. on Criminal Justice, Drug Policy, and Human Resources* (statement of Richard M. Stana, Director,

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[2] The report gave examples of the type of activity that a money laundering statute should reach:

> [P]ayments to the Gambino family that were transferred through three bank accounts, including one in Switzerland, then withdrawn and placed into a safe deposit box; secretion into Swiss bank accounts, by the head of the New Orleans family of La Cosa Nostra, of $1.8 million that had been extorted from the Teamsters; a drug trafficker's practice of making numerous small deposits, totaling over $500,000, into a casino account, gambling a small amount, and then withdrawing the balance from the account in the form of checks made out to third parties, which were deposited in a securities firm before withdrawal; and the Hell's Angels' use of drug proceeds to purchase, through front men, failing businesses and real estate to legitimize the cash.

App. 28a-29a.

Homeland Security and Justice Issues) (May 11, 2004), *available at* http://www.gao.gov/new.items/d04710t.pdf.[3]

The legislative history confirms that Congress intended the money laundering statute to apply to concealment designed to create the appearance of legitimate wealth. For example, the House Report accompanying the money laundering bill cites the President's Commission definition, *supra*, at 8. Comprehensive Money Laundering Prevention Act, H.R. Rep. No. 99-746 at 16 (1986). The Report goes on to explain: "In other words, laundering involves the hiding of the paper trail that connects income or money with a person in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets." *Id.* The Report also notes that "[t]here are as many ways of laundering money as there are individuals willing to do it." *Id.* at 17.

In addition to text and context, two other standard interpretive tools further establish that money laundering means creating the appearance of legitimate wealth. When construing a criminal statute, this Court avoids interpreting distinct statutes to reach the same conduct because of the potential for cumulative punishment unintended by Congress. *See, e.g., Simpson v. United States*, 435 U.S. 6 (1978). Furthermore, in determining Congressional intent, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 14, *quoting United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808,

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[3] Similarly, law enforcement officials in other countries define money laundering as creating the appearance of legitimate wealth. For example, the Interpol General Assembly's working definition of money laundering is "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources." See *Money Laundering: Funds derived from criminal activities*, http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/default.asp (last visited May 1, 2007).

812 (1971). Here, interpreting the money laundering statute to require a design to create the appearance of legitimate wealth prevents the statute from criminalizing acts which are already illegal (*e.g.*, illegal drug sales) and does not unfairly punish conduct that the plain language of the statute does not reach.[4]

In upholding petitioner's money laundering conviction – even absent any design to create the appearanc of legitimate wealth (App. 10a-11a) – the en banc court disregarded the plain statutory language, relevant legislative history, and standard interpretive tools. Under the decision below, any hiding of funds is money laundering on the theory that "Congress chose the broad, unqualified word 'conceal.'" App. 12a. But Congress did not merely require proof of concealment, but proof that the concealment or disguise would hide the nature, origin, source, control or location of the funds. 18 U.S.C. § 1956(a)(2). Those limitations on "conceal" were for the plain purpose of limiting the statute to money laundering, as commonly understood. The decision below reads these textual limitations out of the statute.

Indeed, the Fifth Circuit's understanding of money laundering is of breathtaking scope. As Judge Smith noted in his

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[4] Moreover, Congress has enacted a separate law to address international transportation of a large sum of cash that does *not* involve efforts to launder the money. Under 31 U.S.C. § 5332, bulk cash smuggling targets "[w]hoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States." The penalty for bulk cash smuggling is 5 years imprisonment (rather than the up to 20 years for money laundering), reflecting that it is aimed at the "typically low-level employees of large criminal organizations" who attempt to smuggle cash out the United States. Pub. L. No. 107-56, § 371(a)(5), (b)(1), 115 Stat. 272, 335 (2001).

dissent, "a young petty thief who pickpockets a small sum of cash from an unsuspecting Laredo tourist and intends to spend it on an enjoyable evening at the bars of Nuevo Laredo, just across the Mexican border" would commit money laundering under the en banc majority's interpretation if the youth is found to have concealed the cash in his shoe. App. 33a. This "minor miscreant is now guilty of money laundering and faces up to 20 years' imprisonment and a fine of $500,000," an absurd result that Congress plainly did not intend. *Id.*

B. The Decision Of The En Banc Court Of Appeals Deepens An Existing Circuit Split

As recognized by the dissent below, App. 38a-39a, and as expressly noted in *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006), the circuits are divided as to whether a money laundering conviction requires a design to create the appearance of legitimate wealth.

1. The Sixth, Seventh, and Tenth Circuits Require a Design To Create The Appearance Of Legitimate Wealth

Three circuits have correctly and squarely held that money laundering requires a design to create the appearance of legitimate wealth. As the dissent noted, the decision below implicates a "circuit split" with decisions from the Sixth, Seventh, and Tenth Circuits. See App. 38a n.16 (collecting cases).

Consistent with its rejection of the government's overly broad view of "proceeds" that is on review in *Santos*, the Seventh Circuit insists that money laundering requires proof of concealment to create the appearance of legitimate wealth.[5] In *United States v. Esterman*, 324 F.3d 565 (7th

[5] The holding on review in *Santos* is, in substance, *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002) (Easterbrook, J.). *Scialabba*

Cir. 2003), the court observed that the Money Laundering Control Act was "meant to target the transformation of funds derived from illegal activities into a clean or useable form," and thus reversed the money laundering conviction of a defendant who transferred money from a joint account he shared with a Russian business partner into a series of personal accounts in the United States. *Id.* at 570. Because there was an "absence of efforts to transform ill-gotten funds into apparently innocent assets or funds that the criminal can use later with impunity," *id.* at 572, the court vacated the defendant's conviction. See also *United States v. Jackson*, 935 F.2d 832, 843 (7th Cir. 1991) ("the government must prove that the transaction was designed to conceal one or another of the enumerated attributes of the proceeds involved").

The Tenth Circuit's leading case is *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994) (Ebel, J.). *Dimeck*, like this case, involved the covert transportation of drug proceeds. *Id.* Dimeck was to collect drug funds in Detroit and deliver them to another driver in Detroit, who would then deliver them to California. *Id.* at 1243. Dimeck used his company van to deliver the proceeds in a company box to the second driver, and then he suggested further concealment in a suitcase or taped box before the next leg of the trip. *Id.* A jury convicted Dimeck of international money laundering, but the Tenth Circuit reversed.

The Tenth Circuit posed the legal question as "whether the transportation and delivery of illegal proceeds by couriers to the seller of the drugs constitute[s] money laundering under § 1956(a)(1)(B)(i)." 24 F.3d at 1244. The court emphasized that "[t]o violate the [money laundering] statute, it was necessary that the transaction be motivated significantly by a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of the funds so that they

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holds that "proceeds" in the money laundering statute means "net income," and not all the money involved in the crime.

might enter the economy as legitimate funds." *Id.* at 1245. Pointing to the text of the statute, the Tenth Circuit explained that the "section only prohibits financial transactions designed to conceal or disguise certain *listed attributes* of the proceeds: 'the nature, the location, the source, the ownership, or the control of the proceeds.'" *Id.* at 1246. In Dimeck's case, the Tenth Circuit explained that he had hidden the money but had not sought to "confuse or mislead anyone as to the characteristics" of the funds. *Id.* When a drug courier delivers funds, "it is not necessary for those involved to conceal or disguise the attributes of the money as it passes from one set of hands to another because the people expected to handle the money know it is illegal drug money." *Id.* at 1247. Because Dimeck, as a drug courier, had not concealed the funds for the purpose of "allowing these proceeds to enter into legitimate commerce," the money laundering conviction was reversed. *Id.* at 1246-1247.

Like the Seventh and Tenth Circuits, the Sixth Circuit requires proof of a design to create the appearance of legitimate wealth. In *United States v. McGahee*, 257 F.3d 520 (6th Cir. 2001), the court reversed a concealment money laundering conviction premised on payments made from a bank account containing illegal proceeds. It held that "[t]he checks drawn on the account were not intended to conceal how he got the funds, but merely to convert them to liquid assets." *Id.* at 528. Without evidence that the transactions were designed "to create the appearance of legitimate wealth," the court ruled, the conviction could not stand. *Id.*[6]

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[6] The First Circuit recently approved of *Dimeck*. In *United States v. Morales-Rodriguez*, 467 F.3d 1 (1st Cir. 2006), the court reiterated *Dimeck*'s rule that "mere transportation of concealed drug money [does] not constitute money laundering because the money laundering statute 'was designed to punish those . . . who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.'" *Id.* at 13.

2. Like the Fifth Circuit, the Second, Third, and Eleventh Circuits Do Not Require A Design To Create The Appearance Of Legitimate Wealth

In addition to the Fifth Circuit en banc decision below, the Second, Third and Eleventh Circuits have squarely held that a money laundering conviction does not require proof of a design to create the appearance of legitimate wealth.

This disagreement among the circuits was recognized by the Second Circuit in *United States v. Ness*, 466 F.3d 79 (2d Cir. 2006) (Calabresi, J.). In *Ness*, the court acknowledged that its decision to affirm a money laundering conviction was inconsistent with the approaches taken by other courts of appeals. *Id.* at 81. The defendant there, an armored car service operator, was convicted for transporting drug proceeds overseas at the behest of drug traffickers. *See id.* at 80-81. In affirming the convictions, the Second Circuit relied exclusively on "the level of secrecy that attended Ness's dealings with the traffickers," without considering whether any evidence showed that the transportation in question was undertaken to create the appearance of legitimate wealth or otherwise "cleanse" the drug proceeds. *See id.* at 81. In so doing, the court of appeals observed that "[s]ome other circuits that have decided money laundering appeals would find this evidence legally insufficient." *See id.* at 82 (citing Tenth Circuit's *Dimeck* decision and Fifth Circuit's panel decision in this case). The court concluded, however, that Second Circuit precedent required affirmance. *See id.*, *citing*, *e.g.*, *United States v. Hurtado*, 38 F.App'x. 661, 664 (2d Cir. 2002) (upholding international money laundering conviction where defendant "had attempted to cross into Canada with over a half-million dollars in cash – carried in bags that bore a residual odor of either narcotics or firearms").

In addition to the Second Circuit, the decision below is also aligned with the Third Circuit. In *United States v. Carr*,

25 F.3d 1194, 1199-1200, 1205 (3d Cir. 1994), the defendant hid illegal drug proceeds in a bag, intending to fly internationally. His cash was seized and he was arrested for money laundering. *Id.* at 1200. In upholding his conviction, the Third Circuit explained that the government was required to prove that the defendant "knew the transportation was undertaken to disguise or conceal the money in some material fashion." *Id.* at 1206. The court found sufficient evidence even though there was no design to create the appearance of legitimate wealth. See App. 13a (en banc majority relying on *Carr*).

The decision below also expressly adopted the view of the Eleventh Circuit, which has sustained a money laundering conviction in the absence of any design to create the appearance of legitimate wealth. In *United States v. Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001), the Eleventh Circuit stated that "the text of the statute is not [so] restrictive" as to require proof of concealment to create the appearance of legitimate wealth. Most recently, the Eleventh Circuit, following both *Carr* and the en banc Fifth Circuit below, reiterated its position that money laundering does not require a design to create the appearance of legitimate wealth, finding that money laundering includes "hid[ing] [drug] money in the cars to prevent the authorities from finding it." *United States v. Garcia-Jaimes*, 2007 U.S. App. LEXIS 8963 (11th Cir. Apr. 19, 2007) (discussing the decision below, *Carr*, and *Johnson*).

In summary, in four circuits (the Second, Third, Fifth, and Eleventh) merely hiding illegal proceeds is sufficient to support a money laundering conviction. In at least three other circuits (the Sixth, Seventh, and Tenth), courts require concealing or disguising funds to create the appearance of legitimate wealth. This is precisely the type of well developed circuit split that warrants this Court's resolution. Currently, for example, drug couriers apprehended in New Mex-

ico will get no more than a five-year sentence for bulk cash smuggling, *supra*, at p. 10 n.4, while drug couriers apprehended in Texas can get up to a twenty year sentence under the money laundering statute for the same conduct. Punishment of the same conduct should not depend on which route a drug courier takes through the Southwest.

C. The Issue Is Recurring, Well Presented, and Timely

In addition to the well-developed circuit split, review is also warranted because the factual scenario raising the question presented is recurring. As cases like *Dimeck*, *Carr*, *Hurtado*, and *Garcia-Jaimes* illustrate, individuals are often found carrying hidden money from an illegal drug deal. In the view of four circuits, every such courier can be convicted of money laundering. Moreover, eliminating the requirement that there be a design to create the appearance of legitimate wealth for a money laundering conviction subjects a host of other types of common crime – even, as Judge Smith illustrated, petty theft, *see* App. 33a; *see also supra*, at p. 11 – to a money laundering conviction. The meaning of "conceal or disguise" in the money laundering statute is thus a recurring issue warranting this Court's review.

This case is an ideal vehicle with which to resolve this important circuit split. There is no dispute that illegal funds were hidden. Nor is there any dispute that petitioner is guilty of a crime (bulk cash smuggling). The sole question presented here is whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. There are no other legal issues that could complicate the analysis. Moreover, the decision below provoked four lengthy opinions that articulate all the various competing arguments. When considered with the views of six other circuits, there is no need to wait for additional appellate consideration of the question.

Finally, judicial economy is well served by granting review here while the Court is also considering *Santos*. As noted above, recently the Court granted certiorari in *Santos*. The question presented in *Santos* is whether, under the money laundering statute, "proceeds" from unlawful activities means gross receipts or only profits. Here, the question is the meaning of "conceal or disguise" under the same money laundering statute. The Court should grant this petition so that it can together resolve the circuit splits on the meaning of the money laundering statute and thereby restore clarity to this important criminal statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 2007

APPENDIX

APPENDIX A
COURT OF APPEALS EN BANC OPINION

United States Court of Appeals,

Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Humberto Fidel Regalado CUELLAR, Defendant-Appellant.

No. 05-10065.

Feb. 2, 2007.

Nancy E. Larson, Asst. U.S. Atty. (argued), Fort Worth, TX, Denise B. Williams, Amanda R. Burch, Lubbock, TX, for U.S.

Jerry V. Beard, Asst. Fed. Pub. Def. (argued), Lubbock, TX, for Cuellar.

Appeal from the United States District Court for the Northern District of Texas.

Before JONES, Chief Judge, and KING, JOLLY, HIGGINBOTHAM, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO and OWEN, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

We took this case *en banc* to consider whether the government presented sufficient evidence at Cuellar's trial to support his conviction of international money laundering under 18 U.S.C. § 1956(a)(2)(B)(i). For the reasons that fol-

low, we conclude that the evidence was sufficient to prove all elements of the offense. We also consider Cuellar's arguments that the district court erred in admitting the expert testimony of Agent Nuckles, which arguments were unnecessary for the panel to address under its disposition of the case. Finding no error, we affirm.

I.

On July 14, 2004, defendant Humberto Fidel Regalado Cuellar was stopped just south of Eldorado, Texas, about 114 miles from the Mexican border. Cuellar was traveling south in a Volkswagon Beetle toward Mexico on State Highway 77. Highway 77 runs toward Del Rio, Texas, which is directly across the border from Acuna, Mexico. He was pulled over by Deputy Kevin Herbert from the Schleicher County Sheriff's office, after Herbert observed the vehicle traveling very slowly, approximately 40 miles per hour in a 70 mile per hour zone. The car also swerved onto the shoulder, leading Herbert to suspect that the driver might be intoxicated. Because Cuellar spoke no English, Herbert called State Trooper Danny Nunez to assist him. As they waited for Nunez to arrive, Herbert attempted to determine whether Cuellar had insurance. Cuellar handed him written material from the glove compartment. He then exited the car, without being asked, and went to the front of the VW where the trunk was located and lifted the lid. Such behavior raises suspicion among law enforcement officers because it is considered a diversionary tactic used to draw attention away from other locations in the vehicle where contraband is hidden.

In the papers Cuellar handed Herbert were bus tickets issued in Cuellar's name. The tickets showed northbound travel the previous day, from Del Rio, Texas to San Antonio. They also showed a departure the same day from San Antonio to Big Spring, Texas. From there the tickets showed a departure to Lubbock, with a stop in Tulia, ending in Amarillo and then reversing course. Also among the papers were

three Mexican permits to operate a vehicle without license plates. Two were in Cuellar's name, dated April 17, 2004 and June 28, 2004. The third, dated May 18, 2004, was in the name of David Rodriguez Aleman. The papers also included a traffic ticket issued to Cuellar in Mexico on March 5, 2004.

Nunez arrived and began to talk to Cuellar. Nunez became suspicious of Cuellar because he was avoiding eye contact and seemed very nervous. Cuellar claimed he was on a three-day business trip attempting to buy vehicles, despite the fact that he had no luggage or extra clothing. Cuellar gave conflicting stories about his travels, saying first that he was coming from Acuna, Mexico and later that he had been in San Angelo and was on his way to Acuna. Nunez noticed a bulge in Cuellar's pocket, and when asked about it, Cuellar pulled out a wad of cash that smelled like marijuana to the officers. Nunez then requested that a drug search dog come to the scene.

While waiting for the canine unit, Nunez asked Cuellar for permission to search the vehicle. Cuellar consented. The officers started with the trunk that Cuellar had opened. Nunez noticed drill marks on the fender walls and evidence of tampering on the gas tank. Contraband is often transported in gas tanks and in secret compartments behind fender walls. Nunez considered the markings as evidence of possible modifications to facilitate transportation of contraband. He also noticed that mud appeared to be splashed purposefully on the car with an acoustic gun, which is done by criminals to cover up tool marks, fresh paint and other work done on a vehicle. In addition, while most of the car's interior was faded and worn, the carpet appeared newer. Animal hair was found in the vehicle, concentrated in the rear area, but nowhere else in the car. Cuellar claimed that he had used the VW to transport goats on a prior occasion. Nunez doubted that goats could fit in the space.

Nunez also found a Whataburger bag with a receipt dated earlier the day of the stop. After calling the phone number on the receipt the officers determined that the restaurant was in Big Spring, which is northwest of San Angelo--farther north than Cuellar told officers he had traveled. A border patrol agent called to the scene checked Cuellar's last border crossing date. That information was also inconsistent with Cuellar's story. While Nunez was talking to Cuellar and searching the car, Nunez observed Cuellar standing on the side of the road and making the sign of the cross leading Nunez to believe that Cuellar knew he was in trouble.

Deputy Chatham arrived with the canine unit. The dog alerted on the money in Cuellar's pocket and on the back floorboard area of the car. The officers found a hidden compartment underneath the floorboard containing $83,000 wrapped in duct tape bundles inside blue Walmart sacks and marked with a Sharpie as to the amounts in each bundle. A Sharpie was in the glove box of the car along with a Phillips-head screwdriver that matched the types of screws used in the hidden compartment. Chatham noticed that animal hair was concentrated in the area of the compartment. He testified that animal hair is often used to try to distract a dog during a search but it does not work.

The officers arrested Cuellar and transported the car to the sheriff's office for further investigation. At the station Cuellar wanted to call his family in Mexico and told Nunez that if he did not have the car in Mexico by midnight "his family would be floating down the river."[1] As Cuellar was questioned, he gave several different versions of his travels, including the purpose of his trip, where he had been and when, and who owned the vehicle he was driving.

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[1] When Cuellar made this statement he did not know the officers had discovered the cash in the hidden compartment.

At trial, the government also offered testimony from Special Agent Richard Nuckles of U.S. Immigration and Customs, an expert on drug trafficking organizations. Nuckles testified that drug operations typically involve the flow of drugs from Mexico into the United States and the flow of cash proceeds of drug sales from the United States back into Mexico. He described the usual methods employed by drug traffickers in transporting drugs and money across the border. Cash is usually bundled. Duct tape and plastic are used to cover the odor of drugs and to prevent couriers from pilfering bills from the stash. Vehicles used to transport drugs and cash are sometimes registered in the driver's name to avoid suspicion in the event of a traffic stop. Nuckles also indicated that couriers of drug proceeds would almost certainly know they were involved in illegal activity and were carrying money. Nuckles' description of the typical drug courier was consistent with the facts concerning Cuellar. Nuckles did not testify regarding what customarily happens to the drug money in Mexico other than to say that it is returned to those in charge of the drug trafficking operation. Once in Mexico, which has a more cash-based economy than the U.S., the dollar can be used as readily as the peso.

Cuellar testified at his trial that he was in the business of buying and selling vehicles. He had purchased the Volkswagon Beetle in March and used it in his business. He also testified that he had carried small goats in the car. Cuellar said that he sold the car in May to a Mr. Morcia. Morcia could not get a permit for the car, so Cuellar obtained the permit in his own name in June 2004. Cuellar crossed the car into the United States and delivered it to Mr. Morcia and returned to Mexico.

Cuellar stated that he began a bus trip on July 13, 2004, to Amarillo, Texas to buy two trucks. He was only planning to be gone for two days so he carried no luggage. He arrived in Amarillo on July 14th, where a friend was waiting with

the trucks. They began driving toward Acuna, using one truck to tow the other. The two men stopped in Big Spring, but found no additional trucks at an acceptable price. When they arrived in San Angelo, Cuellar called Mr. Morcia to inquire about trucks for sale. Mr. Morcia showed them a truck and suggested that Cuellar buy the truck and tow the Volkswagon back to Mexico. The VW had a transmission problem that Cuellar was going to repair in Mexico, where needed parts were available. Cuellar did not want to buy the truck Mr. Morcia had shown him but offered to buy a truck he had seen in Big Spring if Mr. Morcia would loan him the necessary funds. Cuellar stated that Mr. Morcia lent him $1,600 to buy the other truck, which was part of the money he was carrying in his pocket.

According to Cuellar, Mr. Morcia told him to deliver the Beetle to a certain shop in Acuna, run by Mr. Morcia's brother-in-law. Cuellar drove the Beetle and his friend took the two trucks. Cuellar was unable to purchase the truck in Big Spring because the price was too high. After looking at other cars, Cuellar bought lunch at the Whataburger and then headed to Acuna. On the way to Acuna, the Beetle broke down and Cuellar could only drive it 18 miles per hour. Cuellar stopped in Eldorado to look at another vehicle but didn't see the price. He was then stopped by the officers just outside of Eldorado. Cuellar said that he opened the hood of the car after being asked to do so. He denied knowing about the money and making the comment about his family floating down the river.

After all the evidence was presented, Cuellar moved for a judgment of acquittal alleging that the government had failed to prove all the elements of the offense, which was denied. The jury found him guilty. After trial, Cuellar filed a motion for judgment of acquittal, alleging that the government failed to prove the required elements of the offense. The district

court denied the motion and sentenced Cuellar. Cuellar appeals.

A divided panel of this court concluded that the government's evidence was insufficient to support Cuellar's conviction on the issue of whether Cuellar's transportation of the funds hidden in the VW was designed to conceal or disguise the nature, location, source, ownership or control of the proceeds and whether Cuellar knew that. We took this case *en banc* to reconsider that question. We also address the evidentiary issue raised by Cuellar relating to admissibility of the expert testimony of Agent Nuckles which the panel did not reach.

II.

Cuellar argues that the district court erred in denying his motion for judgment of acquittal because the facts outlined above are insufficient to sustain Cuellar's conviction under 18 U.S.C. § 1956(a)(2). The denial of a motion for judgment of acquittal is reviewed *de novo*. *United States v. Delgado*, 256 F.3d 264, 273 (5th Cir. 2001). The verdict will be affirmed if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt. *Id.* In assessing the sufficiency of the evidence, this court does not evaluate the weight of the evidence or the credibility of the witnesses but views the evidence in the light most favorable to the verdict, drawing all reasonable inferences to support the verdict. *Id.* at 273-74.

Cuellar was convicted of international money laundering in violation of 18 U.S.C. § 1956(a)(2). Section 1956 outlaws two types of money laundering. Subsection (a)(1) prohibits a person from knowingly engaging in a financial transaction involving illicit criminal proceeds knowing that the transaction is designed to conceal or disguise the nature, location,

source, ownership or control of the illicit proceeds.[2] Subsection (a)(2), the subsection Cuellar's prosecution is brought under, does not require a transaction. Instead it prohibits a person from transporting (or attempting to transport) illicit funds, from a place inside the United States to a place outside the United States, knowing that such transportation is designed to conceal or disguise the nature, location, source, ownership or control of those proceeds.[3] Because both subsections of the statute contain identical language to describe the concealment element of the crimes, courts rely on cases under either subsection as controlling on the issue of concealment. *United States v. Bieganowski*, 313 F.3d 264, 279 (5th Cir. 2002).

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[2] That subsection reads as follows:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

...

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ... shall be sentenced ...

[3] That subsection reads as follows:

(a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States to or through a place outside the United States

...

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ... shall be sentenced ...

The plain language of the statute of conviction, 18 U.S.C. § 1956(a)(2)(B)(i), which outlaws international money laundering, requires the government to prove five distinct elements. First, it must show that the transportation or attempted transportation of funds was across U.S. borders. Second, the funds in question must be the proceeds of specified unlawful activity.[4] Third, the accused must know that the funds represent such proceeds. Fourth, the transportation of the funds must have been designed (in whole or in part) to conceal or disguise the nature, location, source, ownership or control of the proceeds. Fifth, the accused must know that such concealment was part of the transportation plan or design.

The panel unanimously found that the government's proof was sufficient to establish the first three elements. On the first element (the international element), the government offered sufficient evidence that Cuellar was attempting to transport money into Mexico. He told the officers he was headed for Acuna and so testified at trial. Although he claimed he did not know the money was in the car, the jury was free to disbelieve this testimony, especially given the evidence of his guilty knowledge discussed in Section III.

On the second and third elements, the evidence was sufficient to allow a reasonable jury to infer that the money was proceeds of drug trafficking and that Cuellar knew that. The evidence of Cuellar's guilty knowledge discussed in Section III was also probative on these elements. In addition, the money smelled of marijuana and was bundled in a way that is typical of drug trafficking. The jury was able to infer from

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[4] In contrast, the money smuggling statute, 31 U.S.C. § 5332, outlaws the unreported transportation of large sums of money outside the country whether they are legitimate funds or illicit funds. In passing that legislation, Congress found that transporting money across the border may be the most common form of money laundering. 31 U.S.C. § 5332, Congressional Findings and Purpose.

the expert testimony regarding drug trafficking operations that Cuellar's conduct was consistent with that of a typical drug money courier who knows what he is carrying. Based on this evidence, a reasonable trier of fact could have concluded that the money hidden in the car was proceeds of drug trafficking and that Cuellar knew that.

The issue narrows to the fourth and fifth elements, whether the government produced sufficient evidence to allow the jury to find that the defendant was knowingly transporting the funds under a plan designed at least in part "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C.§ 1956(a)(2)(B)(i). Cuellar argues that if all the government's proof shows is that the money was hidden to allow it to be transported to Mexico, that is not enough to sustain a conviction. He reads the statutory prohibition against transportation that is designed in part to conceal the nature, location, source, ownership or control of the proceeds as requiring proof of a plan to conceal the funds once they reach the ultimate destination outside the country.[5] The plain words of the statute do not support this interpretation. The transportation of the funds to the border begins when they leave the owner's hands and are delivered to the courier. The transportation ends when the funds arrive at the destination. Cuellar's transportation plan or design includes the trip to Mexico as well as the disposition of the funds once they reach Mexico. So concealment of the funds during the U.S. leg of the trip is a vital part of the transportation design or plan to get the funds out of this country.

On several bases, we find that the government adequately established the concealment prong of the statute, i.e. that Cuellar's transportation of the funds was designed, in whole

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[5] The dissent makes a similar argument by asserting that the statute does not prohibit "concealing something to transport it," but only prohibits "transporting something to conceal it."

or in part, to conceal or disguise the nature, location, source, ownership or control of the proceeds. First, the evidence establishes that the transportation was designed to conceal the nature of the proceeds. The concealed cash, like the cash found on Cuellar's person, had a strong enough odor of marijuana that the drug sniffing dog alerted on both. The smell identified it as proceeds associated with illicit drug activity. Several measures were taken in an effort to contain the odor of the drug tainted funds and conceal the nature of the hidden funds as drug proceeds during the transportation. The duct tape wrapped cash bundles were first covered in plastic bags and then covered by carpet. Goat hair was placed in the area of the concealed cash in an attempt to conceal the odor from a drug sniffing dog. In addition, because the packaging of the cash in duct tape and markings on the packages are consistent with methods used by drug traffickers without regard to the odor, placing the packaged cash in a hidden compartment also helped conceal the association of the money with an illegal enterprise. The jury could conclude that these aspects of the transportation were designed to conceal or disguise the nature of the cash as drug proceeds.

The evidence also supports a conclusion that the transportation was designed to conceal the location of the cash. Part of the transportation plan outlined above clearly was designed to contain the odor of the cash and hide the cash in a secret compartment during transport.

The government's proof also establishes that the transportation was designed to conceal or disguise the source, ownership or control of the cash. Cuellar had very little information about the person, identified by Cuellar as Mr. Morcia, who was the owner of the cash. The transportation plan allowed the owner to put the cash in the hands of an intermediary or third party, which made it difficult for authorities to determine who actually owned or controlled the cash. Agent Nuckles testified that drug dealers typically insulate them-

selves from others in the organization, such as couriers, to avoid revealing their identity.

Cuellar argues that a conviction under § 1956, which deals with money laundering, requires proof that the defendant's acts created the appearance of legitimate wealth or converted dirty money into clean. The Second Circuit in *United States v. Ness*, 466 F.3d 79 (2d Cir. 2006), expressly rejected this argument and the panel's position on this issue. In *Ness*, the defendant received narcotics proceeds and remitted them to others connected with the same drug operation. Concealment was established by the use of "clandestine meetings to transfer large sums of concealed cash, the use of coded language, and the scrupulous avoidance of a paper trail." *Id.* at 81. On this evidence, the Second Circuit found that "a jury could find that the acts of which Ness is accused were designed, at least in part, to conceal the identity of the funds." *Id.* We agree. Although creating the appearance of legitimate wealth is one way of concealing illicit funds, it is not the only way concealment can be established.[6] This argument is inconsistent with the statutory language and with our case law. Congress chose the broad, unqualified word "conceal." It makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way.

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[6] The phrase "create the appearance of legitimate wealth" appears to have first appeared in a statement of purpose of money laundering by the Department of the Treasury. As quoted in *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994), the purpose is "concealing the illicit sources of their monies by creating the appearance of legitimate wealth." *Garcia-Emanuel* quotes a similar description by the President's Commission on Organized Crime. The commission "described money laundering as schemes designed to assist criminals who 'seek to change large amounts of cash ... into ostensibly legitimate form, such a business profits or loans, before using those funds for personal benefit ...' " *Id.*

Two cases from this circuit hold that simply taking steps to hide illicit funds is sufficient to prove concealment. In *United States v. Short,* 181 F.3d 620 (5th Cir. 1999), the defendant gave $25,000 in cash to his wife with instructions to put it in a safety deposit box in a relative's name. The defendant's conviction of money laundering was sustained even though nothing happened to the cash except the defendant removed it from his possession and tried to hide it. In *United States v. Cihak,* 137 F.3d 252 (5th Cir. 1998), the defendant Bloch hurriedly transferred funds from his bank in the U.S. to banks out of the country after his co-conspirator was convicted of bank fraud. Concealment was found based on the timing of the transfers coincident with his co-defendant's conviction and the defendant's apparent hurry to liquidate his accounts and transfer them out of the country. The funds were not converted into other assets and were placed in accounts under the defendant's name.

Cases in other circuits with facts more closely on point with this case support a conclusion that concealment was established in this case. In *United States v. Carr,* 25 F.3d 1194 (3d Cir. 1994), the defendant's conviction for international money laundering was affirmed on evidence that Carr transported cash in a carry-on bag for a flight to Colombia. When asked at the airport to declare any monetary instruments in excess of $10,000, he declared that he had only $4,000 in cash. A search revealed $180,000 in cash hidden in a container in the bag and an additional $6,000 on his person. Carr told a highly suspicious, "if not incredible" story about the source and destination of the funds.[7]

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[7] See also *United States v. Hurtado,* 38 Fed.Appx. 661 (2d Cir. 2002). Hurtado with others was stopped crossing the border into Canada. A search of her van revealed several pieces of luggage containing $540,000. Drug dogs alerted to two of the bags. Customs agents testified regarding methods used by drug cartels to use couriers to exchange large quantities of drugs for cash, the packing of the money (which matched the packaging in the van), and that cash was commonly placed

Cuellar argues that the 10th Circuit opinion in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), supports his argument that proof of concealment requires evidence that the defendant attempted to convert dirty money into clean money and that mere transportation of illegal funds from place to place is not the type of activity the statute is intended to target. Dimeck's role in the drug transaction was to collect funds in Detroit that were due to the supplier and deliver the funds to the courier who in turn brought the funds to the supplier in California. Dimeck delivered the funds to the courier in an unsealed, untaped box, marked with the logo of Dimeck's company. Dimeck suggested that the courier move the cash to another container, but the courier did not do so.

The 10th Circuit found that the evidence did not support a conviction because "delivery of the money did not result in the kind of transaction prohibited by 18 U.S.C. § 1956(a)(1)(B)(i)." *Id.* at 1246. The funds were transferred to the supplier in a box marked with Dimeck's company logo and were not transported in a manner designed to confuse or mislead anyone about the characteristics of the proceeds. The court also seemed to conclude that the underlying crime was not complete and the government failed to establish that funds were proceeds of illegal activity. The court observed that "The money laundering statute was designed to punish drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises." *Id.* at 1247.

Dimeck is distinguishable from today's case on several bases. We read the primary holding of *Dimeck* to rest on the

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in bags that had previously held the drugs explaining why the drug dogs would alert on bags containing cash. Hurtado lied about her employment and had no legitimate explanation for the source of the cash or its destination. Her conviction for international money laundering under § 1956(a)(2) was affirmed.

conclusion that the funds were not yet proceeds of a specified illegal activity, because the illegal activity, the drug sale, was not complete until the funds were delivered.[8] In addition, the facts of *Dimeck* do not display the effort to hide or conceal the "nature, the location, the source, the ownership, or the control" of the funds that the government established in Cuellar's case. The participants in *Dimeck* simply transported the "illegal proceeds as illegal proceeds" with a minimal attempt at concealment. *Id.* at 1246.

In contrast, the record in today's case reflects a number of facts a recent 11th Circuit opinion considered relevant in establishing the concealment prong of the money laundering statute. *United States v. Johnson*, 440 F.3d 1286 (11th Cir. 2006), contains a thorough review of the types of activities that satisfy the concealment element under 18 U.S.C. § 1956(a)(1) and (a)(2). From a review of the caselaw, the following were listed as evidence to consider in determining whether a transaction or transportation is designed to conceal:

> Statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal funds in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction; or expert testimony on practices of criminals.

Id. at 1291. Another consideration the court found probative is whether the money is "better concealed or concealable after the transaction than before." *Id.* After looking at the

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[8] We question the conclusion that the funds making up the payment are not themselves proceeds of illegal activity because they presumably were generated by sales of the drugs to end users or other distributors.

facts of several transactional money laundering cases, the court stated that they had in common "either numerous transfers, multiple accounts, or the use of third parties to effectuate concealment of the actual source of the money." *Id.* at 1293.

Several of the activities listed above are present in this case. Cuellar made unbelievable and inconsistent explanations for his activities indicating an intent to conceal. The way the money was hidden within the vehicle demonstrates unusual secrecy surrounding the transportation of the funds. Expert testimony was presented about the practices of criminals transporting illegal proceeds to Mexico consistent with Cuellar's transportation. In addition, Cuellar was a third party transporter used to effectuate concealment of the actual source and ownership of the money. Finally, given Mexico's largely cash economy, if Cuellar had successfully transported the funds to Mexico without detection, the jury was entitled to find that the funds would have been better concealed or concealable after the transportation than before.

Under the facts as presented by the government, the evidence was more than sufficient to support Cuellar's conviction of money laundering under 18 U.S.C. § 1956(a)(2).

III.

Cuellar's remaining issue on appeal relates to the expert testimony of Special Agent Nuckles. Cuellar argues that the district court erred in allowing Nuckles to testify because the government failed to provide the defense with the disclosure required by Federal Rule of Criminal Procedure 16. Cuellar also contends that parts of Nuckles' testimony constitute impermissible drug courier profiling and should have been excluded on that basis.

Shortly after Cuellar was arraigned, he filed a motion under Fed.R.Crim.P. 16(a)(1)(G) requesting a summary of the government's opinion testimony. The district court

granted the motion. A little over two weeks before trial, the government informed Cuellar of the government's intent to introduce expert testimony from Richard Nuckles, an Immigration and Customs Enforcement Agent. The letter stated that his testimony would concern background information regarding drug smuggling operations and methods used to transport drugs and money into and out of the United States. Fed. R. Crim. P. 16(a)(1)(G) requires the government to provide upon request a written summary of expert testimony that the government intends to use in its case in chief, including "the witness's opinions, the bases and reasons for those opinions, and the witness's qualification." The government's disclosure did not fully comply with the rule. Cuellar argues that the district court reversibly erred by denying his motion to exclude Nuckles' testimony.

This court reviews a district court's rulings on discovery violations for abuse of discretion. *United States v. Doucette*, 979 F.2d 1042, 1044-45 (5th Cir. 1992). A violation of Rule 16 does not necessitate exclusion of the testimony. Rule 16(d)(2) states that the court "may," but is not required, to impose sanctions. If the district court elects to admit the evidence without sanctions, a new trial must be ordered based on alleged discovery error only when a defendant demonstrates prejudice to his substantial rights. *Doucette* at 1044-45. See also Fed.R.Crim.P. 52(a).[9] Cuellar raises two

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[9] The *Doucette* test provides the proper standard of review for deciding whether the error claimed by Cuellar requires reversal of his conviction. See also Fed. R. Crim. P. 52(a). The dissent is correct that the test laid out in *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. Unit B 1982), provides the district court with the framework for evaluating whether to impose a sanction for a Rule 16 violation and for this court to evaluate the propriety of the sanction imposed. See also *United States v. Katz*, 178 F.3d 368, 371 (5th Cir. 1999), and *United States v. Bentley*, 875 F.2d 1114, 1118 (5th Cir. 1989). Reversal requires a showing that the refusal to impose a sanction prejudiced the defendant.

sources of prejudice, surprise and the admission of drug profile testimony.

The type of expert testimony offered by Officer Nuckles has become almost routine in drug cases where interpretation of the defendant's actions or other evidence would be helpful to the jury. *United States v. Ortega,* 150 F.3d 937, 943 (8th Cir. 1998). In this circuit, "the rule is well-established that an experienced narcotics agent may testify about the significance of certain conduct or methods of operation unique to the drug distribution business, as such testimony often is helpful in assisting the trier of fact understand the evidence." *United States v. Washington,* 44 F.3d 1271, 1283 (5th Cir. 1995). Such opinions, unlike technical or scientific expert opinions, are not complex, so less extensive disclosure may adequately advise the defense of the nature of the testimony and allow them to prepare for cross-examination. *United States v. Jackson,* 51 F.3d 646, 651 (7th Cir. 1995).

Although Cuellar has demonstrated a violation of Rule 16(a)(1)(G) because the government's disclosure regarding Nuckles' testimony was incomplete, he has not shown that the violation prejudiced his substantial rights. The principal violation of Rule 16 arises from the failure to provide Nuckles' qualifications and the basis for his testimony on a timely basis. Cuellar does not claim prejudice related to the information that was lacking in the notice the government did provide or argue that it would have provided additional grounds for cross-examination. The disclosure, while lacking in detail, did reveal in general terms the nature of Agent Nuckles' testimony. The record of counsel's cross examination of Nuckles shows likely familiarity with testimony of this nature which is frequently used by the government in the prosecution of cases of this nature. *See United States v. Washington,* 44 F.3d at 1283, n.45 and cases cited therein. Cuellar did not directly attack Nuckles' testimony about the manner in which drug smuggling operations are conducted.

However, he did effectively cross-examine Nuckles and elicited testimony that tended to undermine the government's point that Cuellar was transporting the proceeds of a drug transaction. Nuckles conceded on cross-examination that a variety of illicit and legal enterprises could have a need to transport United States currency to Mexico and also testified that United States currency can be useful in obtaining permits and other items of value needed to do business in Mexico.

The purpose of Rule 16(a)(1)(G) is "to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16 Advisory Committee Notes to 1993 amendment. Although the notice provided by the government did not contain all the detail required by the rule, it did notify Cuellar of the fact that the government intended to call Agent Nuckles as an expert witness and the subject of his expected testimony. The purposes of Rule 16 were not frustrated. Cuellar has not shown that the violation of the discovery order by the government necessitated the exclusion of Nuckles' testimony, the "most extreme sanction possible." *United States v. Bentley*, 875 F.2d 1114, 1118-19 (5th Cir. 1989). Neither has he demonstrated that his substantial rights were prejudiced by any surprise resulting from the discovery violation. *Doucette*, 979 F.2d at 1044-45; *United States v. Smith*, 354 F.3d 390, 397 (5th Cir. 2003).

Cuellar also argues the district court erred in allowing Nuckles to provide drug courier profile testimony. Cuellar specifically references the following testimony, which occurred during the government's direct examination of Nuckles:

> Q: Does a drug smuggler give his marijuana or his money to be transported to someone who doesn't know what they are transporting?
>
> A: Not in my experience. The people who are driving money or who are driving dope know that they are transporting either dope or money, something of value. They may not know that--whether they are marijuana or cocaine. They may not know how much money they have, but they know they are transporting it.

Although Cuellar objected to the admission of Nuckles' testimony generally as a violation of Rule 16, Cuellar did not object to the above testimony as improper drug-courier profile testimony.

An appellant must raise an objection to the admission of evidence at trial such that the issue is presented to the district court with sufficient specificity. Rule 103(a)(1) F.R.E.; *United States v. Maldonado*, 42 F.3d 906, 910 (5th Cir. 1995). Cuellar's failure to raise the issue at trial results in plain error review. *Id.* at 912. Under that standard, we do not correct an error raised for the first time on appeal unless there is (1) error, (2) that is plain, and (3) that affects substantial rights. *United States v. Olano*, 507 U.S. 725, 731-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). If these factors are established, the decision to correct the forfeited error is within the court's sound discretion, which will not be exercised unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 736, 113 S.Ct. 1770.

We have previously disapproved of the use of an expert's drug courier profile evidence as a substitute for substantive evidence of a defendant's guilt and we repeat that disapproval today. A drug-courier profile is "nothing more than a

compilation of characteristics which aid law enforcement officials in identifying persons who might be trafficking in illegal narcotics." *United States v. Williams,* 957 F.2d 1238, 1242 (5th Cir. 1992). Drug-courier profiles "have long been recognized as inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers" and therefore are not admissible as substantive evidence of the defendant's guilt. *Id.* (internal quotation marks omitted.).

In *United States v. Gutierrez-Farias,* 294 F.3d 657 (5th Cir. 2002), this court held that it was error to admit expert testimony that "crosses the borderline ... between a mere explanation of the expert's analysis of the facts and a forbidden opinion on the ultimate legal issue in the case. The clear suggestion of [the agent's] testimony is that, because most drivers know there are drugs in their vehicles, Gutierrez must have known too." *Id.* at 663 (internal quotations and citations omitted). Similarly in *United States v. Ramirez-Velasquez,* 322 F.3d 868 (5th Cir. 2003), where the agent testified that drug organizations seek trustworthy drivers because their cargo is valuable and uninsurable, this court determined that the admission of such testimony was obvious error because the agent "made the generalization, albeit not quite directly, that drivers know they are carrying drugs." *Id.* at 878-79 & n. 12.

Nuckles' testimony that "[t]he people who are driving money or who are driving dope know they are transporting either dope or money, something of value," is indistinguishable from the testimony held erroneously admitted in *Gutierrez-Farias* and *Ramirez-Velasquez.* *Id.* at 879. Cuellar has thus established an error that is obvious, thereby satisfying the first two prongs of the plain error standard. However, Cuellar also bears "the burden of demonstrating that the error affected his substantial rights, i.e. affected the outcome of the proceedings." *Id.*

Cuellar cannot sustain that burden. As set forth above in the description of the evidence presented at trial, the jury heard ample evidence of Cuellar's guilty knowledge. Cuellar was carrying a large sum of cash on his person that smelled noticeably of marijuana. He was nervous when stopped by officers on the highway and made numerous inconsistent false and implausible statements about his travels. He attempted to focus the officers' attention on the trunk of the car and away from the secret compartment where the money was hidden. Once he was arrested and brought in for further questioning he told officers that if he did not have the car in Acuna by midnight his family would be floating down the river. This evidence provided a firm basis for the jury to find that Cuellar knew he was transporting funds that represented the proceeds of illegal activity. Because Cuellar has not demonstrated that his substantial rights were affected by the admission of improper drug-courier profile testimony, he has not shown plain error. *See Ramirez-Velasquez,* 322 F.3d at 879.

IV.

For the foregoing reasons, Cuellar's conviction is affirmed.

AFFIRMED.

JERRY E. SMITH, Circuit Judge, with whom DeMOSS, Circuit Judge, joins, dissenting:

This is a case of a prosecution run amok. Mike Nifong, another prosecutor apparently familiar with the "win at any cost" mantra,[1] most surely would approve. The government

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[1] *See, e.g.*, Dorothy Rabinowitz, *The Michael Nifong Scandal,* WALL ST. J., Jan. 11, 2007, at A15, available at http://www.opinionjournal. com/medialog/?id=110009507; Editorial, *As Duke Case Unravels, Focus Turns to Prosecutor,* USA TODAY, Dec. 27, 2006, at A12, 2006 WLNR 22559516.

set out to "get" Humberto Cuellar for *something*, and why not? He is apparently a "bad dude," an accessory to what likely was a serious drug-running operation; moreover, this is, after all, the "war on drugs." But instead of charging under a statute of which Cuellar (by his attorney's admission) is guilty, the government used the wrong law, and the majority now has blessed the government's missteps with a holding that makes "money laundering" out of virtually any transfer of illicit proceeds across an international border. A person steals petty cash, hides it in his shoe, and is caught crossing into Mexico: "money laundering," according to the en banc majority's rendering of this appeal.

The government is guilty of at least three excesses in this case. First, it stumbled by charging the wrong statute, when it easily could have used the correct one. Then, in a transparent effort to cover for its blunder, it has succeeded in making a mockery of the concept of money laundering in this court. And finally, it blatantly deprived Cuellar of his rights at trial by its knowing failure to provide adequate disclosure of the expected testimony of a key, expert witness.

Today's zealous en banc majority aids and abets the government's excesses. It exhibits an impressive determination to aid the "war on drugs" and the government's boundless quest to incarcerate a foot soldier who apparently is on the wrong side of that war. Unfortunately, to achieve its end the majority ignores common sense, context, and accepted principles of statutory interpretation to reach an ultimately absurd and embarrassing result. Because I decline to rewrite the law judicially, I respectfully dissent.

I.

The relevant statute, 18 U.S.C. § 1956, bans, *inter alia*, a transportation of money that a defendant knows is designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(2)(B)(1). The ma-

jority finds that because Cuellar temporarily hid the money to transport it, his behavior is within the plain meaning of the words "conceal" and "location."

If "conceal" and "location" are considered in isolation, the majority's reading might be plausible. But these terms are not supposed to be considered in isolation, and we must follow the Supreme Court's guidance:

> The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of a statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. United States Postal Serv., 546 U.S. 481, 126 S.Ct. 1252, 1257, 163 L.Ed.2d 1079 (2006).[2] The majority must rest its interpretation on the meaning of the words in isolation, because if the context and purpose of the statute are properly considered, the majority's interpretative error is quickly exposed.

At least two interpretations of these words are plainly apparent. There is a difference between concealing something to transport it, and transporting something to conceal it. Cuellar was unquestionably doing the former: He concealed money under the floorboards of his car to transport it. Without knowing his ultimate plans for disposing of the cash once

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[2] The *Dolan* Court found that, based on context and precedent, the term "negligent transmission" had a statutory meaning that was more narrow than its ordinary meaning and usage. The majority opinion was joined by Justice Scalia, one of the judiciary's foremost textualists. *See also United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997) ("[T]he plain meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (citing *Reich v. Arcadian Corp.*, 110 F.3d 1192, 1195-96 (5th Cir. 1997))).

he reached his destination, however, it is uncertain whether he was also doing the latter.

For example, if Cuellar intended to place the money in a safe deposit box in another's name, then he was transporting the money to conceal it. But if he intended to spend the money, deliver it to someone, or even donate it to charity, then he was merely concealing the money to transport it. The government did not prove or even attempt to prove anything about what Cuellar planned to do with the money once he reached his destination; the prosecution showed only that he was concealing the money to transport it.

The majority reasons that because "Congress chose the broad, unqualified word 'conceal,' " the statute prohibits both transporting money to conceal it and concealing it to transport it. The majority finds that "[i]t makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way." But later in the opinion the majority explicitly contradicts itself when it declares that the statutory meaning of "conceal" does not include "minimal attempts at concealment," such as concealing money in a closed box.

This is a damaging admission, by the en banc majority, that these words cannot be interpreted in isolation. In isolation they could bear at least several meanings, from banning, as the text states, all concealment, to proscribing only those efforts at concealment that go beyond "minimal effort," to banning concealment that is indicative of the traditional understanding of money laundering. The majority uses the frailest of legal logic to claim that the second option is correct. An honest examination reveals how wrong that proffered logic really is.

The statute's title

This statute's title is "[l]aundering of monetary instruments." Where, as here, a statutory phrase is susceptible to

multiple interpretations, "the title of a statute or section can aid in resolving an ambiguity in the legislation's text."[3] When used in a monetary context, to launder is to disguise illegally-obtained money by making it appear legitimate.[4] This usage of the word is well accepted and has existed for over thirty-five years.[5]

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[3] *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991). *See also, e.g., Carter v. United States*, 530 U.S. 255, 267, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000); *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959); *United States v. Katz*, 271 U.S. 354, 357, 46 S.Ct. 513, 70 L.Ed. 986 (1926); *Smythe v. Fiske*, 23 Wall. 374, 90 U.S. 374, 380, 23 L.Ed. 47 (1874); *Denn v. Reid*, 35 U.S. 524, 527, 10 Pet. 524, 9 L.Ed. 519 (1836).

[4] *See, e.g.*, PRESIDENT'S COMM'N ON ORGANIZED CRIME, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING 7 (Books for Bus. 2001)(1985) (defining money laundering as "[t]he process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate"); BLACK'S LAW DICTIONARY 1027 (8th ed.2004) (stating that money laundering is "the act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"); 8 OXFORD ENGLISH DICTIONARY 702 (2d ed.1989) (explaining that to launder is "to transfer funds of dubious or illegal origin, usually to a foreign country, and then later to recover them from what seem to be 'clean' sources"); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 992 (4th ed. Houghton Mifflin Co. 2006) (showing that to launder is "to disguise the source or nature of (illegal funds, for example) by channeling through an intermediate agent"); THE NEW OXFORD AMERICAN DICTIONARY 958 (2d ed. Oxford Univ. Press 2005) (stating that to launder is to "conceal the origins of (money obtained illegally) by transfers involving foreign banks or legitimate businesses").

[5] THE BARNHARD DICTIONARY OF ETYMOLOGY 581 (Robert K. Barnhard ed., H.W. Wilson Co.1988) ("The modern meaning of launder, as used to denote the 'cleansing' of illegally obtained 'dirty' money to make it appear 'legitimate, lawfully gained, or acceptable,' originated in 1970.").

The statute's title cuts against the majority's interpretation. Of the two interpretative possibilities--concealing money to transport it and transporting money to conceal its location--the latter is consistent with the definition of money laundering, which is to make dirty money difficult to trace by concealing its illegality.

Legislative history

The terms of a criminal statute are to be construed according to their "ordinary and natural meaning ... as well as the overall policies and objectives of the statute." *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004) (quoting *United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997)). If the language can bear more than one meaning, courts can use legislative history as an interpretive aid. *Id.* at 743.

When viewed in its totality, this statute is designed to combat money laundering, which is the cleansing of illegal funds, and not to curb the mere transportation of concealed cash. This is reinforced, as I have said, by the statute's title. The multiple possible interpretations warrant, however, an examination of legislative history.

This inquiry is fraught with peril, because it is seductively easy to find a small, but misrepresentative, piece of legislative history that appears to support a given position.[6] Caution is thus required.[7] But even when viewed with great

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[6] As Judge Leventhal warned, using legislative history is sometimes akin to "looking over a crowd and picking out your friends." *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

[7] *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 683-84 (5th Cir.2002) (citing *Boureslan v. Aramco*, 857 F.2d 1014, 1018 (5th Cir.1988), *adopted en banc*, 892 F.2d 1271 (5th Cir.1990), *aff'd sub nom. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991)).

care, the legislative history makes it obvious that Congress passed this statute to combat traditional money laundering. Absent is any support whatsoever for the majority's interpretation.

The government's response to money laundering activity began with the passage of the Bank Secrecy Act in 1970.[8] That law, however, did not reach much of the money laundering that was occurring. Thus, in 1984 the President's Commission on Organized Crime released a report detailing the problem presented by money laundering and recommending the legislative solution that eventually became the law at issue in this case, § 1956.

The executive report defines money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate." PRESIDENT'S COMM'N, *supra,* at 7. The term is "derived from the argot of criminals, who refer to 'dirty' or 'black' cash being 'washed' so that it can be used openly." *Id.* at 84 n. 4. The report provided several examples of the money laundering behavior that should be targeted by legislation: payments to the Gambino family that were transferred through three bank accounts, including one in Switzerland, then withdrawn and placed into a safe deposit box; secretion into Swiss bank accounts, by the head of the New Orleans family of La Cosa Nostra, of $1.8 million that had been extorted from the Teamsters; a drug trafficker's practice of making numerous small deposits, totaling over $500,000, into a casino account, gambling a small amount, and then withdrawing the balance from the account in the form of checks made out to third parties, which were deposited in a securities firm before withdrawal; and the Hell's Angels' use of drug proceeds to purchase, through front men, failing businesses and real estate to

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[8] *See* Pub.L. 91-508, 84 Stat. 1118, § 221(a)(2), as amended, 31 U.S.C. § 5313(a).

legitimize the cash. *Id.* at 10-11. Each of these examples is consistent with a legislative desire to combat not the mere transportation of hidden cash, but the cleansing of illegitimate cash to make it appear legitimate.

The same intent is apparent in the legislative history once Congress began, based on the President's recommendations, to craft the money laundering bill. The committee report states that Congress aimed the legislation at "complex schemes to disguise the illegal nature and true source" of the proceeds of their illegal activity. *United States v. Butler*, 211 F.3d 826, 829 (4th Cir. 2000) (quoting S. Rep. No. 99-433, at 2 (1986)). Many of our sister circuits agree; as one summarized, "The legislative history indicates that Congress passed the money laundering statutes to criminalize the means criminals use *to cleanse their ill-gotten gains.*"[9]

This intent is also plainly evinced by the floor statements of the bill's sponsors. Senator Thurmond, then Chairman of the Judiciary Committee, said that "[c]reation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes." *See* 132 CONG. REC. 17,571 (1986). Senator Biden remarked that "[m]oney laundering is the process by which the

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[9] *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995) (emphasis added). *See also United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991) (citing S. Rep. No. 99-433, at 4); *United States v. Estacio*, 64 F.3d 477, 481 (9th Cir. 1995) ("The senate report on § 1956 expresses the need for a federal criminal offense aimed directly at the activity of laundering the money gained from illegal activity."); *United States v. Holmes*, 44 F.3d 1150, 1154 (2d Cir. 1995) ("Creation of a money laundering offense is imperative if our law enforcement agencies are to be effective against the organized criminal groups which reap profits from unlawful activity by camouflaging the proceeds through elaborate laundering schemes.") (quoting S. Rep. No. 99-433, at 9).

proceeds of crime are disguised to appear legitimate .... Or as a former money launderer stated, 'Laundering money is to switch the black money or the dirty money to clean money.' " *Id.* Senator DeConcini declared that "[w]ithout the means to launder money, thereby making cash generated by a criminal enterprise appear to come from a legitimate source, organized crime could not flourish as it now does." *Id.* at 18,487. Finally, Senator Hatch defined the target of the bill as "the process by which one conceals the existence, illegal source, or illegal application of income and camouflages the source of that income to make it appear legitimate." *Id.*

The final piece of legislative history evincing the intent of Congress can be found by examining a subsequent law, 31 U.S.C. § 5332, which prohibits bulk cash smuggling. *See* Pub.L. No. 107-56, § 371(c), 115 Stat. 337 (2001). It was enacted in 2001 because Congress realized that § 1956 did not prohibit the carrying of bulk cash across a U.S. border.[10] Or, as the Committee put it, "under current law, the person transporting currency may not be guilty of any money laundering offense." See H.R. Rep. No. 107-250(i), at 37. The law was passed with a finding that "[t]he arrest and prosecution of bulk cash smugglers are important parts of law enforcement's effort to stop the laundering of criminal proceeds, but the couriers who attempt to smuggle the cash out of the United States are typically low-level employees of large criminal organizations ...." Pub.L. No. 107-56 § 371(a)(5). The conclusion is inescapable--Congress enacted § 5332 because bulk cash smuggling by low-level drug couriers is not proscribed by § 1956.

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[10] The astute reader may ask why Cuellar was not convicted under this statute. It is because the government did not charge him with it, but opted instead to charge money laundering, which carries a maximum prison term of twenty years, compared to a maximum of five for bulk cash smuggling. *Cuellar concedes on appeal that he violated § 5332.*

Thus, the history underlying the enactment of § 5332 is especially damning to the position taken today by the en banc majority. Congress would not have passed a statute banning bulk cash smuggling by low-level drug couriers if such behavior was already prohibited as money laundering. Maybe because it would doom its desired conclusion, the majority conveniently opts not to address this issue. It ignores all the legislative history, hiding instead behind the facade that the plain language of the statute compels its conclusion.

Further, none of the pitfalls that occasionally plague an inquiry into legislative history is present here. It is overwhelmingly evident from the executive report, committee reports, sponsor statements, and subsequent legislation that Congress intended the money laundering statutes to target the cleansing of illegally obtained money. In support of the en banc majority's novel interpretation, however, the government can muster only one snippet of legislative history from § 1956--a single sentence from a floor statement that, when considered fairly and in context, actually cuts *against* the majority's interpretation.[11] In contrast, Cuellar cites thirty-eight pieces of legislative history in consistent support of the correct interpretation.

The rule of lenity

The rule of lenity is nearly as old as statutory interpretation itself. *See United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 79, 5 L.Ed. 37 (1820). That rule dictates that ambiguous statutory language in criminal statutes should be strictly construed to ensure that we do not penalize conduct that Congress did not intend to criminalize. *See, e.g., United*

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[11] The majority cites a statement from Senator Biden that money laundering is used by drug traffickers to convert illegal cash into manageable form. This quote came two sentences after Senator Biden had defined money laundering as "the process by which the proceeds of crime are disguised to appear legitimate." 132 Cong. Rec. 17,571 (1986).

States v. Elrawy, 448 F.3d 309, 316 (5th Cir. 2006). It is an "outgrowth of our reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Id.* (quoting *Simpson v. United States*, 435 U.S. 6, 15-16, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978)). The rule of lenity is triggered if the interpretive issue is subject to "some doubt," and the doubt must be "resolved in favor of the defendant." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-85, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978) (citing *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)).

The rule of lenity cuts against the majority's interpretation. The majority resolves the statute's ambiguity in a manner that exposes Cuellar to a punishment of twenty years' imprisonment and a fine of up to $500,000. A strict construction of the statute, as required by the rule of lenity, would find that conviction requires proof that the money is being transported to conceal its location, a burden the government utterly failed to meet.

The Canon Against Absurdities

It is well established that reviewing courts must avoid interpretations that produce absurd results.[12] This maxim also dictates that if a statute's language appears plain but leads to absurd results, the court should examine extrinsic interpretive aids.[13]

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[12] *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988); *Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1285 (5th Cir. 1994) (citing *Birdwell v. Skeen*, 983 F.2d 1332, 1337 (5th Cir. 1993)).

[13] *Clinton v. City of New York*, 524 U.S. 417, 429, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994); *Burns v. United States*, 501 U.S. 129, 135, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454-55, 109 S.Ct. 2558,

Two examples illustrate the absurdity of the majority's interpretation. First, imagine a young petty thief who pick-pockets a small sum of cash from an unsuspecting Laredo tourist and intends to spend it on an enjoyable evening at the bars of Nuevo Laredo, just across the Mexican border. Wanting to escape suspicion at the border, the youth conceals the cash in his shoe. But alas, his nervous demeanor prompts border agents to question him further, and he reveals his crime. Under today's holding, this minor miscreant is now guilty of money laundering and faces up to 20 years' imprisonment and a fine of $500,000.

Our hypothetical international money-laundering youth satisfies all five prongs of the statute: (1) He attempted to transport funds across a U.S. border; (2) the funds were the proceeds of illegal activity; (3) he knew the funds were illegal; (4) the method of transportation was designed to conceal the location of the funds by hiding it from law enforcement; and (5) the accused knew that the concealment was part of the transportation plan. The fourth prong is satisfied because, under today's en banc decision, the concealment prong of the money laundering statute requires only that a defendant temporarily hide money for the purpose of transporting it. This is because, as the majority lamely explains, "Congress chose the broad, unqualified word 'conceal.' It makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way."

This is an embarrassing and absurd result and thus cannot be the correct meaning of the statute, yet it is the conclusion of today's majority and is now the law in this circuit. At oral

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105 L.Ed.2d 377 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 104 L.Ed.2d 557 (1989); *Am. Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 459 (Former 5th Cir. Oct. 1981) (citing *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940)).

argument the government claimed that the hypothetical pickpocket would not be guilty of money laundering because hiding money in one's shoe is not concealment, but instead is only "mere concealment," whereas hiding money in a hidden compartment covered with goat hair is concealment. When pressed, the government attorney stated, "I don't think that just concealing money is what Congress was talking about."

Today's majority makes a similarly irrational distinction--between concealment and "mere concealment"--when it distinguishes *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994). In that case the defendant hid cash in a box. The majority claims this was insufficient to satisfy the concealment prong of the statute, because it was "a minimal attempt at concealment."

Here the majority's zealous reasoning completely unravels. Its argument is purportedly premised on the plain words of the statute, so it refuses to consider the interpretive tools used above, because it maintains that the text is not susceptible to multiple interpretations: The majority reasons that "to conceal" is to hide something,[14] and Cuellar hid money while he was transporting it, so his transportation was designed to conceal and satisfies the statute.

But, when confronted with *Dimeck*, or presumably with the hypothetical above, the majority says that it is only a "minimal attempt" at concealment, or as the government says, "mere concealment" or "normal concealment," and accordingly is not concealment under the statute. Thus, the majority goes beyond the plain meaning and finds that when

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[14] Conceal means "to put, remove, or keep out of sight or notice; to hide." 3 OXFORD ENGLISH DICTIONARY 646 (2d ed.1989). *See also* WEBSTER'S NEW INTERNATIONAL DICTIONARY 551 (2d ed. 1958) ("To hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of"); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 271 (1984) ("to prevent disclosure or recognition of; to place out of sight").

Congress said "conceal," it actually meant "tried really hard to conceal" or "concealed really well." This majority, as only a majority can, is having its cake and eating it too: It refuses to examine tools of statutory interpretation on the excuse that it must stop at the plain meaning, but it distinguishes unfavorable precedents and hypotheticals by going *beyond* the plain meaning.

The absurdity of the result reached by the majority is starkly illustrated by still another hypothetical. Cuellar would not be found guilty of violating this statute under today's ruling if he had set the cash, bundled and smelling of marihuana, in a large pile in the passenger seat of his car. Under such a circumstance, he would have made no attempt to hide the money, so his behavior would fall outside the reach of the majority's ruling. One lesson pickpockets and petty criminals near a U.S. border should take from today's ruling is to carry the proceeds of their illegal activity openly and conspicuously when crossing the border, because if they hide the money they place themselves at risk of a conviction for money laundering, with its stiffer penalties. Although that might be a rational legislative goal, it is not encompassed within a fair reading of § 1956.

The majority does not even pretend that Congress could have intended these results. In fact, the majority does not address these hypotheticals or any other consequences of its ruling. Instead, its *ipse dixit* opinion focuses exclusively on ensuring that Cuellar's conviction is upheld by any means acceptable to a majority of the en banc judges.

Caselaw

The cases cited by the majority, when reviewed carefully, provide no support for its view. The majority leads with *United States v. Ness*, 466 F.3d 79 (2d Cir.2006), in which the defendant moved narcotics proceeds abroad at the behest of drug traffickers. He transferred millions of dollars in cash from the United States to Belgium, Canada, and Is-

rael by employing a sophisticated network of couriers who used code words and clandestine meetings to smuggle the funds. *United States v. Ness*, 2003 WL 21804973, at *1-*4 (S.D.N.Y. Aug.6, 2003). *Ness* does not, as the majority claims, indicate that the position of the Second Circuit aligns with the position the majority adopts today. The *Ness* court explicitly premises its holding on the complexity of the scheme: "[W]e express no view as to sufficiency issues that might arise when the remittance of unlawful funds is surrounded by less elaborate stratagems or a lesser measure of secrecy." *Ness*, 466 F.3d at 81. The scrupulous avoidance of a paper trail and the use of numerous couriers, small bills, clandestine meetings to funnel millions of dollars in drug proceeds overseas is classic money laundering, and it could not be more distinguishable from Cuellar's use of duct tape and goat hair to conceal money temporarily while he transported it. The majority next relies on *United States v. Short*, 181 F.3d 620 (5th Cir. 1999) (Davis, J.), in which defendant was convicted of money laundering because he gave his wife $25,000 and asked her to place it in a safe deposit box rented in the name of one of her relatives. The majority claims that "nothing happened to the cash except the defendant removed it from his possession and tried to hide it." The majority errs: Something did happen to the cash--Short passed it to someone else with directions to place it in a secure location under the name of an innocent relative. This is classic money laundering--the transfer of dirty money through legitimate individuals to disguise its criminal source.

This court did not hold in *Short*, as today's majority appears to claim, that Short's conduct was sufficient to justify the conviction merely because he tried to hide the cash. Rather, the panel based its holding on the manner by which Short did so, particularly his planned transfer of the cash through others. The court held that the conviction was justified because "Short was attempting to conceal or disguise [the cash] by having his wife place the money in a safety de-

posit box under the name of one of her relatives." *Id.* at 626. By placing the money under the name of someone not connected directly to Short, but only to his wife, he was trying to make the cash appear legitimate.

In contrast to Short, Cuellar merely hid cash to transport it. He did not attempt to conceal the fact that the cash was drug money; to the contrary, as Agent Nuckles testified, Cuellar's transportation method typified that of a drug courier. Nor did Cuellar attempt to transfer the cash through legitimate persons, as did Short, to make it appear legal. These distinctions place Cuellar's conduct outside the holding of *Short*, under which the evidence against Cuellar is insufficient to sustain a conviction *under the statute the government charged.*

The majority next cites *United States v. Cihak*, 137 F.3d 252 (5th Cir. 1998), which is just as distinguishable. Cihak received approximately $2 million in illegal kickbacks funneled through his attorney in an elaborate eight-step scheme to mask the nature and source of the funds.[15] Following a codefendant's conviction, Cihak transferred $860,000 to multiple foreign accounts in different countries. *Id.* at 262. The

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[15] The opinion described the laundering scheme by which defendant Bloch would provide kickbacks to Cihak:

> (1) First City paid Banner [Bloch's company] for Bloch's consulting services; (2) Bloch deposited the checks from First City into Banner's account; (3) the funds were then wired to another Banner account; (4) from this account, Bloch drew checks payable to himself; (5) these checks were deposited into his personal account; (6) checks made payable to Landan [Cihak's attorney] were then drawn on this account; (7) these checks were deposited into Landan's firm's account; (8) from this account, Landan issued checks payable to various banks as payment on Cihak's outstanding debts and to make investments for Cihak.

Cihak, 137 F.3d at 257.

money was first transferred to two accounts in Texas before being sent to accounts in Panama and Mexico. *Id.* As was the case in *Ness* and *Short*, this is classic money laundering: The defendant split his illegally gained money into smaller amounts, transferred these amounts multiple times through different banks, and ultimately placed them into offshore accounts. It is amazing that the majority finds this precedent, involving sophisticated white-collar money laundering, applicable to Cuellar's use of duct tape and goat hair to hide money covered in marihuana. It should be obvious that Cihak's behavior typified money laundering, as targeted by § 1956, and that Cuellar's did not.

The only other published case cited by the majority is *United States v. Carr*, 25 F.3d 1194 (3d Cir.1994), in which defendant made numerous trips to the Cayman Islands and Colombia to deposit quantities of bills of small denominations that had been exchanged for large quantities of fresh $100 bills. *Id.* at 1199-1200. Once again, note the facts omitted by the majority, which show that Carr was participating in classic money laundering: the exchange of large bills for smaller ones and the making of multiple cash deposits into offshore banks accounts.

The majority repeats the same drill four times--it cites cases, carefully removes all context, and ignores the inconvenient details that distinguish those cases from Cuellar's conduct. All four decisions stand squarely for the proposition that § 1956 bans only the transportation of money to conceal it, not the concealment of money to transport it. Further, in citing only these four inapposite decisions, the majority ignores the overwhelming caselaw, in both this court and our sister circuits, to the effect that the statute requires a design to create the appearance of legitimate wealth.[16] It is as-

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[16] *See, e.g. United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995) ("It is necessary to show a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of funds so that it might enter

tounding that the majority rewrites the law in this circuit, and creates a circuit split, in such a cavalier and intellectually imprecise manner.

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the economy as legitimate funds."); *United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 925 (5th Cir. 1992); *United States v. Powers*, 168 F.3d 741, 748 (5th Cir. 1999) ("Under the money laundering statute, the government must ... show that the defendant desired to create the appearance of legitimate wealth or otherwise to conceal the nature of funds so that the money could enter the economy as legitimate funds."); *United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir. 1999) ("In one sense, the acquisition of any asset with the proceeds of illegal activity conceals those proceeds by converting them into a different and more legitimate-appearing form. But the requirement that the transaction be designed to conceal implies that more than this trivial motivation to conceal must be proved."); *Dimeck*, 24 F.3d at 1246; *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474-77 (10th Cir. 1994) ("[C]ases involving investments made with illegal proceeds are close to the core of the statute's purpose of criminalizing changing cash into an ostensibly legitimate form, such as business profits or loans, before using those funds for personal benefit.") (internal quotations and citations omitted); *United States v. Sanders*, 929 F.2d 1466, 1472 (10th Cir. 1991); *United States v. Stephenson*, 183 F.3d 110, 121 (2d Cir. 1999) ("There is no indication, therefore, that the drug proceeds were spent to create the appearance of legitimate wealth ....") (internal quotations and citations omitted); *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993); United States v. Esterman, 324 F.3d 565, 570 (7th Cir. 2003) ("[T]he Money Laundering Control Act of 1986 was meant to target the transformation of funds derived from illegal activities into a 'clean' or useable form."); *United States v. Jackson*, 935 F.2d 832, 841-42 (7th Cir. 1991); *United States v. Wynn*, 61 F.3d 921, 926 (D.C.Cir. 1995) (upholding a money laundering conviction because, *inter alia*, "the jury reasonably could have inferred that Wynn knew that their money was dirty and that he knew that the two were anxious to disguise their identity as the purchasers of the merchandise and the source of the cash used to pay for it."); *United States v. Johnson*, 440 F.3d 1286, 1291 (11th Cir. 2006) ("Merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime .... If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute." (quoting *United States v. Majors*, 196 F.3d 1206, 1213 (11th Cir. 1999))).

Finally, in addition to arguing that Cuellar concealed the money, the majority holds that the evidence can bear a jury finding that Cuellar's transportation method concealed the "nature of the cash as drug proceeds." But Cuellar did precisely the opposite: He transported the cash in a manner that made it obvious that this was drug money; the sum of $83,000 in cash smelling of marihuana was bundled, wrapped in duct tape, and covered with plastic bags, then placed in a hidden compartment and covered with carpet and goat hair. These measures would not persuade anyone that this cash was legitimate.

Quite the opposite--it is difficult to imagine what more could be done to indicate that this cash was illicit. In addition to comporting with common sense, this conclusion is verified by Agent Nuckles's testimony that this was a "usual method" of transporting drug money. The majority is incorrect: This method of transportation made it abundantly obvious that the cash was drug money.

In sum, the majority finds a way to ensure that Cuellar goes to prison, thereby protecting the Executive Branch's prosecution despite its having charged entirely the wrong statute. Unfortunately, that now-successful effort requires ignoring the statute's context, its title, the legislative history, the rule of lenity, the canon against absurdities, and existing caselaw. I can find no basis for the majority's holding other than the personal legislative preferences of its members.

II.

The majority also holds that the district court acted permissibly in not imposing sanctions on the government for violating Federal Rule of Criminal Procedure 16. This is error.

As it does with accepted principles of statutory interpretation, the en banc majority completely ignores the framework used by this court in evaluating whether to impose

sanctions for a violation of rule 16. In *United States v. Sarcinelli*, 667 F.2d 5, 6-7 (5th Cir. Unit B 1982), we articulated a four-factor test to determine a proper sanction: (1) the reasons why disclosure was not made; (2) the amount of prejudice to the opposing party; (3) the feasibility of curing such prejudice with a continuance of the trial; and (4) any other relevant circumstances.[17]

A brief recounting of facts omitted by the majority is needed before embarking on the analysis. Cuellar requested a summary of the government's expert witnesses that described the "witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). The court's discovery order required a response by a specified date. Almost three weeks after that deadline, and only two weeks before trial, the government stated, in a letter, that Nuckles would testify

> concerning the organizational structure of a typical drug smuggling operation, including, but not limited to, how drug proceeds are packaged, hidden and transported; routes of travel; time of day; types and conditions of vehicles; documents kept by transporters in their vehicles or on their persons; manner in which drugs are smuggled into the United States and money is smuggled out of the United States; and any other testimony that may help the jury understand this case.

The government provided no further details on the specifics of the testimony or on Nuckles's qualifications until it gave Cuellar a handwritten note in response to his motion to deny the expert testimony. The note, in its entirety, read, "Rick Nuckles = 12 years U.S. Customs; 4 years DEA; 7 years state + local, UC w/ DEA, 100's of drug cases investi-

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[17] *See also United States v. Katz*, 178 F.3d 368, 371 (5th Cir. 1999) (citing *United States v. Bentley*, 875 F.2d 1114, 1118 (5th Cir. 1989)).

gated in all capacities." The court denied Cuellar's motion, noting its familiarity with Nuckles based on its admission of him as an expert on at least one occasion.

Instead of using the *Sarcinelli* framework, which it mentions in a footnote, the en banc majority creates a new test. It first finds that the government did violate rule 16, then it notes that "[t]he type of expert testimony offered by Officer Nuckles has become almost routine."[18] Finally comes the new test: The refusal to impose sanctions on the government was not improper after all, according to the majority's notion, because Cuellar effectively cross-examined Nuckles, so Cuellar's substantial rights were not prejudiced.

The two cases cited by the majority for its new test provide no support. In *United States v. Doucette*, 979 F.2d 1042 (5th Cir. 1992), the disputed evidence was made available to defendant well before trial, and defense counsel did not avail himself of the opportunity to review it. "For this reason, there can be no violation of Rule 16 where, as here, the defendant's lack of diligence is the sole cause of his failure to obtain evidence made available by the government." *Id.* at 1045. This holding has no bearing on the present case, where the government, in blatant and intentional violation of rule 16, provided no timely opportunity for Cuellar to review fully the expected testimony of Nuckles.

The other cited authority is *United States v. Smith*, 354 F.3d 390 (5th Cir. 2003), which dealt with whether one sentence of the expert's testimony was beyond his expertise and exceeded the disclosure that was made in accordance with rule 16. This is plainly much different from the case before us, where (as the en banc majority admits) the government has violated rule 16.

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[18] This section conveniently omits any discussion of the majority's later finding that Nuckles's drug courier profiling testimony was improper and should have been excluded.

Doucette and *Smith* thus do not form a reasonable basis for the majority's new test. Today's majority opinion creates one "super factor" that supplants the entire *Sarcinelli* framework: If the defendant effectively cross-examines an expert witness, any violation of rule 16 by the government in failing to disclose that witness's testimony is overlooked.

I wonder whether the majority has considered the risky game today's opinion creates for criminal defendants when the government violates rule 16. Defendants whose counsel "burn the midnight oil" to cobble together a cross-examination strategy that, while less effective than one that could have been prepared had the government followed rule 16, still manages to be semi-effective, now face the prospect of losing the remedy for the rule 16 violation. On the other hand, the defendant whose attorney does nothing and mounts an ineffective cross-examination risks harming his chances at trial but stands a better chance of an appellate court's finding that a remedy is needed for the rule 16 violation. These perverse incentives provide further reason for this court to hew to the *Sarcinelli* test.

Had the court applied *Sarcinelli,* and had it done so properly, it would have found the following: Under the first factor, the government makes no attempt to explain its failure to adhere to the discovery order. Under the second, Cuellar was caused substantial prejudice by the government's three-week head start in the preparation of Nuckles, while Cuellar had two weeks to prepare and little detail about the content of Nuckles's testimony. Third, the district court likely could have cured the prejudice by granting, as Cuellar requested, a continuance so he could prepare more fully.

Finally, other factors may come into play. It is here that the majority should have considered the factor it has chosen to make dispositive, that despite the violation of rule 16, Cuellar elicited (the seemingly self-evident) testimony from Nuckles that some "legal enterprises could have a need

to transport United States currency to Mexico." This is less than eviscerating cross-examination testimony, but according to today's majority, it is sufficient to excuse the government's rule 16 violation.

In sum, the government completely flouted the discovery rules to Cuellar's detriment but offered no explanation for its action. The majority finds that, because Cuellar elicited self-evident testimony on cross-examination, he had sufficient time to prepare, so no sanction is necessary. This holding creates perverse incentives: incentives for the government to ignore well-established discovery rules because it need not fear sanctions, and incentives for the defendant to hold back from mounting an effective defense so he might have a chance to have the government sanctioned on appeal.

III.

In summary, Humberto Cuellar likely committed a serious violation of the United States Code, but not of the section of which he was convicted. Justice requires that he be tried for a crime of which a reasonable prosecutor can believe he is actually guilty. The war on drugs is not an excuse to violate the norms of fair play and evenhandedness. I call upon the Attorney General to confess error in this case of prosecutorial excess, and I respectfully dissent from the majority's blessing of the government's failure to do justice in this case.

DENNIS, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion for the reasons assigned in parts I through III of Judge Smith's dissenting opinion.

APPENDIX B

COURT OF APPEALS PANEL OPINION

United States Court of Appeals,

Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Humberto Fidel Regalado CUELLAR, Defendant-Appellant.

No. 05-10065.

Feb. 22, 2006.

Denise B. Williams (argued), Amanda R. Burch, Lubbock, TX, for U.S.

Jerry V. Beard. Asst. Fed. Pub. Def. (argued), Lubbock, TX, for Cuellar.

Appeal from the United States District Court for the Northern District of Texas.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Humberto Cuellar was arrested while traveling toward Mexico with a large sum of cash hidden in his car. He was convicted of international money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i). Cuellar argues that the district court improperly admitted the government's expert testimony. He also contends that the court should have granted his post-trial motion for acquittal because the government failed to present evidence sufficient to prove the required elements of the crime beyond a reasonable doubt. Because

we agree that the government's evidence was insufficient to support a finding of guilt under the specific statute of conviction, we reverse and render a judgment of acquittal.

I.

The following facts were established by the government at trial: On July 14, 2003, Cuellar was traveling south toward Mexico on State Highway 77. He was pulled over by Deputy Kevin Herbert from the Schleicher County Sheriff's office. Because Cuellar spoke no English, Herbert called State Trooper Danny Nunez to assist him.

Nunez became suspicious of Cuellar because he was avoiding eye contact and seemed very nervous. Cuellar claimed he was on a three-day business trip despite the fact that he had no luggage or extra clothing. Nunez noticed a bulge in Cuellar's pocket, and when asked about it, Cuellar pulled out a wad of cash that smelled like marihuana to the officers. Nunez then asked and received permission to search the car and requested that a drug search dog come to the scene.

The dog alerted on the money in Cuellar's pocket and on the back floorboard area of the car. The officers found a hidden compartment underneath the floorboard containing $83,000 wrapped in duct tape inside blue sacks and marked with a Sharpie as to the amounts in each bundle.

The foregoing facts were established through the testimony of Herbert, Nunez, and Deputy Jason Chatham, who handled the drug dog. The government also offered testimony from Special Agent Richard Nuckles of U.S. Immigration and Customs, an expert on drug trafficking organizations, who testified that drug operations typically involve the flow of drugs from Mexico into the United States and the flow of cash proceeds of drug sales from the United States back into Mexico. He described the usual methods employed by drug traffickers in transporting drugs and money

across the border. He also indicated that couriers of drug proceeds would almost certainly know they were involved in illegal activity and were carrying money.

Nuckles' description of the typical drug courier was consistent with the facts concerning Cuellar. Nuckles did not testify regarding what customarily happens to the drug money in Mexico other than to say that it is returned to those in charge of the drug trafficking operation.

The government's case consisted solely of the testimony of the officers and Nuckles. Cuellar took the stand and testified that he knew nothing about the money and was returning the car to Acuna, Mexico, at the behest of a shadowy character he identified only as Mr. Morcia. After all the evidence was presented, Cuellar moved for a judgment of acquittal, which was denied. The jury found him guilty. After trial, he filed a motion for judgment of acquittal, alleging that the government had failed to prove the required elements of the offense. The district court denied the motion and sentenced Cuellar.

II.

The denial of a motion for judgment of acquittal is reviewed *de novo*. *United States v. Delgado*, 256 F.3d 264, 273 (5th Cir. 2001). The verdict will be affirmed if a reasonable trier of fact could conclude from the evidence that the elements of the offense were established beyond a reasonable doubt. *Id.* In assessing the sufficiency of the evidence, this court does not evaluate the weight of the evidence or the credibility of the witnesses but views the evidence in the light most favorable to the verdict, drawing all reasonable inferences to support the verdict. *Id.* at 273-74.

Cuellar argues that Nuckles's expert testimony should not have been allowed because the government failed to provide the defense with a summary of his expected testimony after the court ordered it to do so. Cuellar also contends that parts

of Nuckles's testimony constituted impermissible drug courier profiling and should have been excluded on that basis. See *United States v. Williams*, 957 F.2d 1238, 1241 (5th Cir. 1992). Because the government failed to present sufficient evidence to support a guilty verdict, we do not reach these evidentiary issues.

Cuellar argues that we should exclude from our sufficiency of the evidence analysis any evidence that was improperly admitted. This argument is unavailing. In reviewing a verdict for sufficiency of the evidence, we ask whether a reasonable jury could have returned a guilty verdict based on the evidence presented to it.[1] We do not ask at this stage whether that evidence was properly admitted, so we review the sufficiency of the government's case in light of all the evidence, including the disputed expert testimony.

III.

The plain language of the statute of conviction, 18 U.S.C. § 1956(a)(2)(B)(i), which outlaws international money laundering,[2] requires the government to prove five distinct ele-

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[1] *See United States v. Marshall*, 762 F.2d 419, 423 (5th Cir. 1985) (holding defendant not entitled to have court of appeals disregard inadmissible evidence in conducting sufficiency of evidence review).

[2] That section provides:

> (a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity ...

ments. First, it must show that the transportation or attempted transportation of funds was across U.S. borders. Second, the funds in question had to be the proceeds of specified unlawful activity. Third, Cuellar must have known that the funds represented such proceeds. Fourth, his transportation of the funds must have been designed (in whole or in part) to conceal or disguise the nature, location, source, or control of the proceeds. Fifth, Cuellar had to know that such concealment was the design of his enterprise.

On the first element (the international element), the government offered sufficient evidence that Cuellar was attempting to transport money into Mexico. He admitted as much when he told the officers he was headed for Acuna. Although he claimed he did not know the money was in the car, the jury was free to disbelieve this testimony, especially given the inconsistencies in his story.

On the second and third elements, there was sufficient evidence to allow a reasonable jury to infer that the money was proceeds of drug trafficking and that Cuellar knew that. The circumstances surrounding the arrest were suspicious to say the least, and Cuellar's proffered explanation for his activities was unimpressive. The money smelled of marihuana and was bundled in a way that is typical of drug trafficking. The jury was able to infer from the expert testimony regarding drug trafficking operations that Cuellar's conduct was consistent with that of a typical drug money courier who knows what he is carrying. Based on this evidence, a reasonable trier of fact could have concluded that the money hidden in the car was proceeds of drug trafficking and that Cuellar knew that.

On the fourth and fifth elements, we ask whether Cuellar's transportation of the money was designed in whole

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shall be sentenced ....

or in part to conceal or disguise its nature, location, source, ownership or control and whether Cuellar knew that.[3] Based on its statements at trial and in its appellate brief, the government apparently thought it had proven this element merely by showing that the money was hidden in Cuellar's car. Throughout the trial, the government focused its attention on establishing that the money was most likely drug proceeds, essentially overlooking the equally important concealment prong.

In *United States v. Olaniyi-Oke,* 199 F.3d 767, 771 (5th Cir. 1999), this court discussed the concealment prong of the money laundering statute in reversing the conviction of a defendant who used fraudulently-acquired credit cards to purchase computers.[4] We focused on the underlying purpose or

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[3] In other words, "the government must prove that the defendant *intended* to conceal the nature, location, source, ownership, or control of the proceeds of the unlawful activity." *United States v. Cihak,* 137 F.3d 252, 261 (5th Cir. 1998) (emphasis added) (citing *United States v. Dobbs,* 63 F.3d 391, 397-98 (5th Cir. 1995)).

[4] The government argues that *Olaniyi-Oke* is inapplicable because the court was interpreting § 1956(a)(1) rather than § 1956(a)(2)(B)(i). The government attempts to distinguish the two sections on the ground that § 1956(a)(1) requires a "financial transaction" but § 1956(a)(2)(B)(i) proscribes certain transports, transmissions, and transfers of funds and nowhere mentions "financial transactions." The government's proffered distinction is irrelevant.

The statutory language focused on by the *Olaniyi-Oke* court is found in the concealment prong of § 1956(a)(1). Section 1956(a)(1) and (2)(B)(i) use identical language to require that the defendant's activity be "designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Differing language elsewhere in the two sections has no bearing on the meaning of their identical concealment prongs. Precedent directly interpreting the concealment prong of § 1956(a)(1) is therefore binding on our interpretation of the same language in § 1956(a)(2)(B)(i). See *United States v. Bieganowski,* 313 F.3d 264, 279 (5th Cir. 2002) (holding that an offense under § 1956(a)(2)(B)(i) is almost identical to an offense under § 1956(a)(1), with the lone exception

"design" of the alleged laundering transaction and considered the design of the transaction to be the acquisition of computers. The concealment of the true source of the money was just part of the means the defendant employed to achieve this design.

We held that if the defendant's purchases were "engaged in for present personal benefit, *and not to create the appearance of legitimate wealth*, they do not violate the concealment prong of the money laundering statute." *Id.* (citing *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) (emphasis added)). Concealment of the money facilitated the transaction but was not itself the design of defendant's activity, so no money laundering occurred, and the statute was not violated. "[T]he requirement that the transaction be designed to conceal implies that more than this trivial motivation to conceal must be proved." *Id.*

The alleged laundering activity is Cuellar's transportation of the cash across the border to an unknown recipient. The underlying purpose of the enterprise, as the government presented it to the jury, was to get the money to Mexico. Concealing the money in the hidden compartment was the means employed to achieve this, but the concealment itself was not the "design" of Cuellar's activity, as the statute requires; the concealment was merely ancillary to Cuellar's design.

Taking hidden cash to Mexico is not money laundering unless some further design to conceal can be proved. The statute would prohibit taking drug money to Mexico for the purpose of concealing the fact that it is drug money. The statute does not outlaw concealing drug money from the police for the purpose of taking it to Mexico.

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of the international element of § 1956(a)(2)(B)(i)). The government's concern with whether Cuellar was engaged in a financial transaction is therefore misplaced.

Thus, the government failed to prove the necessary design to conceal. Cuellar was not trying to "create the appearance of legitimate wealth" by smuggling drug money across the border. The financial channels through which the money might have flowed subsequent to Cuellar's venture are unknown. It is possible, even likely, that the money was destined for some kind of laundering once in Mexico, but the government provided no evidence to indicate such was the case.

Even if such evidence had been presented, the government would also have had to show that Cuellar knew his actions were designed to help launder the money. There is no evidence, nor was it alleged, that Cuellar would have had anything to do with any subsequent laundering.

In summary, under the government's theory, hiding drug money in one's car with the intent to take it across the Mexican border is international money laundering. At trial, the government successfully proved the case it set out to establish. This court's precedent indicates, however, that much more than that is required to uphold a conviction under the particular statute that the government (for whatever reason) elected to use, § 1956(a)(2)(B)(i).

The government failed to provide sufficient evidence to show that Cuellar's activity was designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." Armed with a proper understanding of the statute, no rational trier of fact could have found Cuellar guilty based on the evidence presented at trial.[5]

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[5] This does not necessarily mean that Cuellar will be free of prosecution. Under *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), he may be tried for separate offenses arising from the same criminal transaction so long as "each offense contains an element not contained in the other." Thus the government may try Cuellar again, provided that (1) the new charge contains an element not

The conviction is REVERSED and a judgment of acquittal is RENDERED.

W. EUGENE DAVIS, Circuit Judge, dissenting:

Because I am persuaded that the government proved the concealment prong of the money laundering offense in this case, I dissent from majority opinion.

The issue boils down to whether the government produced sufficient evidence to allow the jury to find that the defendant was knowingly transporting the funds (drug proceeds) under a plan designed at least in part "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(2)(B)(i). The majority opinion concludes, and I agree, that the government offered sufficient evidence to establish that the money was proceeds of drug trafficking and that Cuellar knew that. The government also proved that the defendant knowingly concealed the money in the vehicle and intended to deliver the funds to Mexico. Based on the plain language of the statute, once the government produced evidence that allowed the jury to find these facts, the concealment element was established.

The jury could have found concealment on several levels. First, there was an overall plan or design (in which Cuellar was an integral part) to surreptitiously move cash proceeds of drug sales from the United States to Mexico. The expert on drug trafficking organizations testified that this was the standard modus operandi of such organizations. On another

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found in § 1956(a)(2)(B)(i) and (2) § 1956(a)(2)(B)(i) contains an element not found in the second offense. Without passing judgment on the double jeopardy implications of any future prosecution, we note that the government may be able to make a case against Cuellar for bulk cash smuggling under 31 U.S.C. § 5332(a).

level, this plan in which Cuellar participated, effectively removed the funds from the kingpin's hands and concealed his ownership and control of the funds. The removal of the funds and concealment of the owner of the funds also served to remove incriminating evidence from the possession of the kingpin and avoided possible government confiscation of the cash. The surreptitious movement of these funds to Mexico as part of the cycle of the drug trade was, of course, necessary because unlike a legitimate businessman, the drug kingpin could not go to the bank, deposit the funds and wire the money to his supplier in Mexico. The concealed movement of the funds was an integral part of the business of the drug enterprise. Also, and at its most basic level, Cuellar's method of carrying out his mission described above included hiding or concealing the funds in his vehicle and surrounding the money with animal hair to conceal the fund's location from drug dogs.

Other circuits have found on facts similar to ours that the government established the concealment prong of the money laundering statute. In *United States v. Hurtado,* 38 Fed.Appx. 661 (2d Cir. 2002) (unpublished), Hurtado challenged the sufficiency of the evidence to support her conviction for international money laundering. The evidence showed that she, along with two other adults and three children, were stopped as they crossed the border from the U.S. to Canada. Upon a search of her minivan, agents found several bags of luggage containing $540,000. Drug dogs alerted to two of the bags which contained the largest sums of money. The government presented testimony of customs agents regarding methods used by drug cartels to exchange large quantities of drugs for cash using couriers and how money was customarily packaged. The funds in the minivan were packaged in a manner consistent with their testimony. The record evidence also reflected that Hurtado lied about her employment and had no legitimate explanation for the source of the cash or its destination. Based on this record the

court concluded that a rational jury could find all the essential elements of the money laundering offense.

In *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994), the following evidence was found sufficient to satisfy the concealment prong of the statute: before departing on a trip from Philadelphia to Colombia, Carr received a blue carry-on bag from Gonzalez (the kingpin of the conspiracy); when asked to declare any monetary instruments in excess of $10,000, he stated that he had only $4,000 in cash; a search revealed $180,000 in cash hidden in containers in the bag and $6,000 on Carr's person; Carr told a highly suspicious, "if not incredible," story about the source and destination of the funds. The facts of our case are not materially different from those in *Hurtado* or *Carr* and in my view satisfy the concealment element of the international money laundering statute.

United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999), the case relied on by the majority, is not inconsistent with this result. *Olaniyi-Oke* involved a transaction in which the defendant used a fraudulently obtained credit card issued in the name of the victim to purchase two computers. This court found that the transactions were engaged in for present personal benefit and not to create the appearance of legitimate wealth, so they did not satisfy the concealment prong of the money laundering statute. In other words, the straightforward use of a credit card to make a purchase does not satisfy the concealment element of the offense.

We are not dealing with a defendant's straightforward purchase of goods with a stolen or fraudulently obtained credit card. The government established in this case that the defendant purposefully concealed drug proceeds and was transporting them to Mexico in a manner consistent with drug trafficking patterns for the region. Under these facts, it is clear to me that the jury could easily find that the defendant knew "that such transportation, transmission, or transfer is designed in whole or in part ... to conceal or disguise the

nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity" as is required for conviction under 18 U.S.C. § 1956(a)(2)(B)(i). As set forth above, the Second and Third Circuits dealing with factual situations substantially similar to these have found this concealment element satisfied.

Based on the plain language of the statute and the decisions of other circuits discussed above, I would affirm Cuellar's conviction. Accordingly, I respectfully dissent.

APPENDIX C

DISTRICT COURT JUDGMENT

United States District Court
Northern District of Texas
San Angelo Division

UNITED STATES OF AMERICA

v.

HUMBERTO FIDEL REGALADO CUELLAR
Defendant.

Case Number 6:04-CR-0055-01-C

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, HUMBERTO FIDEL REGALADO CUELLAR, was represented by David E. Sloan.

The defendant was found guilty on count 1 by a jury verdict on 10/13/2004 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 USC § 1956(a)(2)(B)(i) & 18 USC § 2	Laundering of Monetary Instruments and Aiding and Abetting	07/14/2004	1

As pronounced on 01/06/2005, the defendant is sentenced as provided in pages 1 through 4 of this Judgment.

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 6th day of January, 2005.

/s/ Sam R. Cummings
DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 78 months.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

The defendant shall report in person to the probation office in the district to which the defendant is released from the custody of the Bureau of Prisons, or in which the defendant makes entry into the United States, within 72 hours of release or entry.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the fist five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

As a condition of supervised release, upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official for deportation in accordance with the established procedures provided by the Immigration and Naturalization Act, 8 USC §§ 1101 *et seq.* As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

In the event the defendant is not deported immediately upon release from imprisonment, or should the defendant ever be within the United States during any portion of his term of supervised release, he shall also comply with the standard conditions recommended by the U.S. Sentencing Commission and shall comply with the following additional conditions:

1. The defendant shall not illegally re-enter the United States, if deported.

2. The defendant shall cooperate in the collection of DNA as directed by the U. S. Probation Officer.

APPENDIX D

MONEY LAUNDERING STATUTE

§ 1956. Laundering of monetary instruments

(a)

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)

(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 [FN1] of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving--

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978)); [FN2]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving--

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 [FN3] (relating to fraudulent Federal credit institution entries), 1007 [FN3] (relating to fraudulent Federal Deposit Insurance transactions), 1014 [FN3] (relating to

fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 [FN3] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section

11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons) [FN4]

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may

direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same

penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

FILED
AUG 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT

No. 06-1456

In the Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
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Department of Justice
Washington, D.C. 20530-0001
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QUESTION PRESENTED

Whether proof that petitioner transported cash proceeds of drug trafficking concealed in a hidden and disguised compartment in a car destined for Mexico was sufficient to establish that he transported money in a manner "designed," at least "in part," to "conceal or disguise" either "the nature, the location, the source, the ownership, or the control" of those proceeds, within the meaning of 18 U.S.C. 1956(a)(2)(B)(i).

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In the Supreme Court of the United States

No. 06-1456

HUMBERTO FIDEL REGALADO CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-44a) is reported at 478 F.3d 282. The now-vacated opinion of the panel of the court of appeals (Pet. App. 45a-56a) is reported at 441 F.3d 329.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2007. The petition for a writ of certiorari was filed on May 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of international money laundering, in violation of 18 U.S.C. 1956(a)(2)(B)(i). He was sentenced to 78

months of imprisonment, to be followed by three years of supervised release. Pet. App. 58a-59a. A divided panel of the court of appeals reversed petitioner's conviction and remanded with instructions to enter a judgment of acquittal. *Id.* at 53a. The court of appeals subsequently granted the government's petition for rehearing en banc and affirmed petitioner's conviction. *Id.* at 1a-2a, 7a-16a, 22a.

1. On July 14, 2004, petitioner was traveling south in a Volkswagen Beetle toward Mexico on United States Route 277. Route 277 runs toward Del Rio, Texas, which is directly across the border from Acuna, Mexico. Deputy Kevin Herbert of the Schleicher County Sheriff's office noticed that petitioner's car was traveling very slowly, approximately 40 miles per hour in a 70 mile-per-hour zone. The car also swerved onto the shoulder, leading Deputy Herbert to suspect that the driver might be intoxicated. Noticing that petitioner's car did not have a registration sticker or a license plate, Deputy Herbert decided to stop the vehicle. Petitioner was stopped just south of Eldorado, Texas, about 114 miles from the Mexican border. Pet. App. 2a; Gov't Supp. C.A. Br. on Reh'g 2-3.

Because petitioner spoke no English, Deputy Herbert called State Trooper Danny Nunez to assist him. As they waited for Trooper Nunez to arrive, Deputy Herbert attempted to determine whether petitioner had insurance. Petitioner handed Deputy Herbert some written material from the glove compartment. He then exited the car, without being asked, and went to the front of the car (where the trunk was located) and lifted the lid. As Deputy Herbert looked through the papers petitioner provided, he noticed bus tickets issued in petitioner's name. The tickets showed northbound travel

the previous day, July 13, 2004, from Del Rio, Texas to San Antonio. They also showed a departure the same day at 7:05 p.m. from San Antonio, arriving at 1:20 a.m. the next day (July 14) in Big Spring, Texas. From there, the tickets showed a departure to Lubbock, with a stop in Tulia, ending in Amarillo at 7:00 a.m., and then reversing course. By the time he was stopped in Eldorado that evening, petitioner had travelled nearly 1,000 miles in less than two days' time. Pet. App. 2a-3a; Gov't Supp. C.A. Br. on Reh'g 3. The papers provided to Deputy Herbert also included three Mexican permits to operate a vehicle without license plates. Two were in petitioner's name, dated April 17, 2004, and June 28, 2004. The third, dated May 18, 2004, was in the name of David Rodriguez Aleman. The papers also included a traffic ticket issued to petitioner in Mexico on March 5, 2004. Pet. App. 2a-3a; Gov't Supp. C.A. Br. on Reh'g 4.

Trooper Nunez arrived and began talking with petitioner. Trooper Nunez noticed that petitioner was avoiding eye contact and seemed very nervous. Petitioner stated that he was on a three-day business trip in Texas attempting to buy vehicles, despite the fact that he had no luggage or extra clothing. Petitioner also gave conflicting stories about his travels, saying first that he was coming from Acuna, Mexico, and later that he had been in San Angelo and was on his way to Acuna. He also neglected to mention that he had been in Amarillo. Trooper Nunez noticed a bulge in petitioner's pocket, and, when asked about it, petitioner removed a large roll of cash, mostly in ten- and twenty-dollar denominations, that smelled like marijuana to the officers. Trooper Nunez then requested that a drug search dog come to the scene. Pet. App. 3a; Gov't Supp. C.A. Br. on Reh'g 4-5.

While waiting for the canine unit, Trooper Nunez asked petitioner for permission to search the vehicle, and petitioner consented. The officers started with the trunk that petitioner already had opened. Trooper Nunez noticed drill marks on the fender walls and evidence of tampering on the gas tank—markings that were consistent with attempts to facilitate the transportation of contraband. He also noticed that mud appeared to be splashed purposefully on the car with an acoustic gun, which he knew was often done to cover up tool marks, fresh paint and other work done on a vehicle. In addition, while most of the car's interior was faded and worn, the carpet appeared newer. Trooper Nunez spotted some type of animal hair in the vehicle, concentrated in the rear area, but nowhere else in the car. Petitioner explained the presence of the hair by claiming that he had used the car to transport goats from San Angelo to Mexico on a prior occasion, but Trooper Nunez doubted goats could fit in the space. Pet. App. 3a; Gov't Supp. C.A. Br. on Reh'g 5-6.

Trooper Nunez also found a bag from a fast-food restaurant with a receipt that was dated 5:55 p.m. on the day of the stop. The receipt had a telephone area code that covered Big Spring, Midland, and El Paso, so Trooper Nunez dialed the phone number and determined that the restaurant was located in Big Spring, which is 90 miles northwest of San Angelo—farther north than petitioner told officers he had traveled. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 6.

A border patrol agent called to the scene by Deputy Herbert checked petitioner's last border crossing date, which turned out to be inconsistent with petitioner's version of events. While Trooper Nunez was talking to petitioner and searching the car, Trooper Nunez ob-

served petitioner standing on the side of the road and making the sign of the cross, leading Trooper Nunez to believe that petitioner knew he was in trouble. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 6.

When the canine unit arrived, the trained narcotics-detection dog alerted on the money in petitioner's pocket and on the back floorboard area of the car, indicating the presence of narcotics. The dog handler, Deputy Jason Chatham, then detected a hidden compartment underneath the floorboard; the original floorboard had been cut out and screwed back down with metal screws, though part of it was sticking up. The floorboard was covered with carpet, and two car speakers in wooden boxes were on top of it. Deputy Chatham noticed that animal hair was concentrated in the area of the compartment, and he testified that animal hair is often used to try to distract a dog during a search (but that it does not work). Pet. App. 4a, 46a; Gov't Supp. C.A. Br. on Reh'g 7.

The compartment was found to contain $83,000 in cash wrapped in duct tape bundles inside blue Walmart sacks and marked with a Sharpie as to the amounts in each bundle. The officers discovered a Sharpie in the glove box of the car along with a Phillips-head screwdriver that matched the types of screws used in the hidden compartment. Pet. App. 4a; Gov't Supp. C.A. Br. on Reh'g 7.

The officers arrested petitioner and transported the car to the sheriff's office for further investigation. At the station, petitioner wanted to call his family in Mexico and told Trooper Nunez that if he did not have the car in Mexico by midnight "his family would be floating down

the river."[1] As petitioner was questioned, he gave several different versions of his travels, including the purpose of his trip, where he had been and when, and who owned the vehicle he was driving. Pet. App. 4a-5a; Gov't Supp. C.A. Br. on Reh'g 8.

2. A federal grand jury in the Northern District of Texas issued an indictment charging petitioner with a violation of the "concealment" prong of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i).[2] At trial, the government presented testimony from the officers at the scene of the arrest and from an expert in drug trafficking organizations, who testified about the flow of drugs and money to and from Mexico. Pet. App. 1a-5a. Petitioner testified at his trial, and gave conflicting and inconsistent accounts of the events leading up to his arrest. At the close of all the evidence, petitioner

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[1] At the time petitioner made this statement, he did not know the officers had discovered the cash in the hidden compartment. Pet. App. 4a n.1.

[2] 18 U.S.C. 1956(a)(2) makes it a crime, punishable by up to twenty years' imprisonment, to:

> transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
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> * * * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

moved for a judgment of acquittal. The motion was denied, and the jury returned a verdict of guilty. Petitioner's renewed motion for a judgment of acquittal was again denied. *Id.* at 5a-7a.

3. A divided panel of the court of appeals reversed the district court's denial of the motion for judgment of acquittal. Pet. App. 45a-56a. The majority concluded that the government had proved that the money was illegal drug proceeds and that petitioner knew that it was, and that petitioner was attempting to transport the money to Mexico. *Id.* at 49a. But the majority determined that the government failed to prove that petitioner's transportation of the money "was designed in whole or in part to conceal or disguise its nature, location, source, ownership or control and whether [petitioner] knew that." *Id.* at 49a-50a. The majority reasoned: "Taking hidden cash to Mexico is not money laundering unless some further design to conceal can be proved. The statute would prohibit taking drug money to Mexico for the purpose of concealing the fact that it is drug money. The statute does not outlaw concealing drug money from the police for the purpose of taking it to Mexico." *Id.* at 51a. The majority noted that "[i]t is possible, even likely, that the money was destined for some kind of laundering once in Mexico, but the government provided no evidence to indicate such was the case." *Id.* at 52a.

Judge Davis dissented. In his view, the concealment prong of the international money laundering statute was satisfied by the government's proof that petitioner "knowingly concealed the money in the vehicle and intended to deliver the funds to Mexico." Pet. App. 53a.

4. The court of appeals granted the government's petition for rehearing en banc and affirmed petitioner's conviction. Pet. App. 1a-44a. The court concluded that "the government adequately established the concealment prong of the statute, i.e., that [petitioner's] transportation of the funds was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the proceeds." *Id.* at 10a-11a. The court reasoned that the jury could have found that the circumstances surrounding the transportation of the funds—*i.e.*, bundling them, hiding them in a secret compartment under carpet covered with animal hair—were designed "to conceal or disguise the nature of the cash as drug proceeds," *id.* at 11a, as well as the "location" of those proceeds. *Ibid.* The court further concluded that the evidence permitted the jury to conclude that petitioner's conduct "was designed to conceal or disguise the source, ownership or control" of those funds because the transportation plan allowed the true owner to place the funds in the hands of an intermediary, making it difficult for authorities to determine who "actually owned or controlled the cash." *Id.* at 11a-12a.

The en banc majority rejected petitioner's contention that the money-laundering statute "requires proof that the defendant's acts created the appearance of legitimate wealth." Pet. App. 12a. The court reasoned that, "[a]lthough creating the appearance of legitimate wealth is one way of concealing illicit funds, it is not the only way concealment can be established." *Ibid.* Noting that "Congress chose the broad, unqualified word 'conceal,'" the court observed that "[i]t makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way." *Ibid.*

The court concluded that its decision was supported by cases from other circuits with similar facts. Pet. App. 13a-16a. The court distinguished "on several bases" *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), on which petitioner relied to support his argument that proof of concealment "requires evidence that the defendant attempted to convert dirty money into clean money." Pet. App. 14a.[3]

Three judges dissented. Pet. App. 22a-44a (Smith, J., joined by DeMoss, J.); *id.* at 44a (Dennis, J.). The dissenting judges distinguished between "concealing money to transport it and transporting money to conceal its location," and concluded that only the latter fell within "the definition of money laundering, which is to make money difficult to trace by concealing its illegality." *Id.* at 27a. And they contended that the majority had "create[d] a circuit split" as to whether the money laundering statute requires proof of a design to create the appearance of legitimate wealth. *Id.* at 38a-39a.

ARGUMENT

Petitioner contends (Pet. 5-17) that the court of appeals erred in concluding that the evidence was sufficient to support the jury's finding that petitioner's transportation of the illicit drug proceeds was designed to "conceal or disguise" the nature, location, source, ownership, or control of the proceeds under 18 U.S.C. 1956(a)(2)(B)(i). Specifically, petitioner asserts that the statute requires proof of a design to create the appearance of legitimate wealth, and that the ruling in this case deepens an alleged conflict among the circuits on this

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[3] The court also rejected petitioner's argument (which he does not press in this Court) that the district court erred in permitting the testimony of an expert witness. Pet. App. 16a-22a.

issue. The court of appeals' interpretation of the statute is correct, and there is no conflict in the courts of appeals on this issue. Further review is not warranted.[4]

1. The court of appeals correctly held that the concealment prong of the international money laundering statute, 18 U.S.C. 1956(a)(2)(B)(i), does not require proof of a design to create the appearance of legitimate wealth. That statute makes it a crime for anyone to, among other things, "transport" or "attempt[] to transport * * * funds from a place in the United States to * * * a place outside the United States * * * knowing that such transportation * * * is designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *Ibid.* Here, petitioner transported wrapped bundles of large sums of cash derived from drug dealing concealed in a hidden compartment in his car that was covered with animal hair to hinder its discovery. Under any plain reading of the statutory text, that conduct constitutes a "design[]," at least "in part," to "conceal or disguise" the "nature" of the proceeds (*i.e.*, their association with an illegal enterprise), the "location" of the proceeds (*i.e.*, their physical presence in a secret compartment), and the "source," "ownership" and "control" of the proceeds (*i.e.*, their connection to the true owner). Pet. App. 10a-12a; see *United States* v. *Garcia-Jaimes*, 484 F.3d 1311, 1322 (11th Cir. 2007) (affirming international money laundering convictions based on evidence that the defendants entered into a transportation scheme using car haulers

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[4] A similar issue is presented in *Ness* v. *United States*, petition for cert. pending, No. 06-1604 (filed June 1, 2007), and *Nunez-Virraizabal* v. *United States*, petition for cert. pending, No. 06-11863 (filed June 11, 2007).

to secretly transport illicit drug proceeds from the United States to Mexico), petition for cert. pending *sub nom. Nunez-Virraizabal* v. *United States*, No. 06-11863 (filed June 11, 2007).

Petitioner nonetheless contends that the "conceal or disguise" element of the statute should be construed to require proof that the design to conceal the proceeds was devised for the purpose of creating "the appearance of legitimate wealth." Pet. 7. But even under such a reading of the statute, petitioner could not prevail. Because Mexico has a largely cash-based economy, where United States dollars are as negotiable as Mexican pesos, petitioner's transportation of the money into Mexico would have converted it into useable funds. Gov't Supp. C.A. Br. on Reh'g 12 (citing R. 179-180, 188-189).

In any event, as the court of appeals recognized (Pet. App. 12a), "the text of the statute is not [so] restrictive." *United States* v. *Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001), cert. denied, 537 U.S. 813 (2002). The statute makes it an offense to transport money for the purpose of concealing or disguising it. See 18 U.S.C. 1956(a)(2)(B)(i). *How* the funds are concealed or disguised—whether by creating the appearance of legitimate wealth, putting the money in the name of a third party, converting the property to another form, or commingling the money with other property—is irrelevant, except to the extent that the particular means chosen is probative of a design (*e.g.*, the more convoluted the transaction, the easier it is to infer a design to conceal or disguise).

Similarly, the statute does not require the government to prove *why* the nature, location, source, or ownership of the proceeds was concealed or disguised. Nothing in the text compels the government to prove

that the nature, location, source, ownership, or control of the property was concealed or disguised in order to create the appearance of legitimate wealth. To the contrary, a criminal may seek to conceal the illicit funds for reasons entirely unrelated to a design to create the appearance of legitimate wealth, such as to evade paying taxes, to prevent seizure and forfeiture of the funds under the asset forfeiture laws, to avoid connecting himself with unlawful conduct or with a criminal confederate, or to forestall a court from ordering him to use the funds to pay restitution to his victims. While the criminal's *ultimate* goal may be to convert illicit funds into usable (apparently legitimate) funds, that process may take several steps. Indeed, rather than concealing or disguising the nature, location, source, ownership, or control of funds to create the appearance of legitimate wealth, a criminal may engage in such conduct in an effort to create the appearance of having no wealth at all. The statutory text reaches all of that conduct.

Thus, as the court of appeals concluded (Pet. App. 12a), while disguising funds for the purpose of creating the appearance of legitimate wealth would establish the concealment element of the statute—and may be a common understanding of what it means to "launder" money—that is hardly the exclusive way to violate the statute. Accordingly, the court of appeals correctly refused to engraft such a requirement onto the statute. See, *e.g.*, *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("Where, as here, the statute's language is plain, 'the sole function of the courts is to en-

force it according to its terms.'") (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).[5]

2. Petitioner contends (Pet. 11-16) that the circuits are divided on the question whether Section 1956(a)(2)(B)(i) "requires a design to create the appearance of legitimate wealth." Pet. 11. He contends that decisions from the Sixth, Seventh, and Tenth Circuits require proof of such a design, while three other circuits (the Second, Third, and Eleventh) reject the need for such proof. There is no conflict on this issue warranting this Court's review.

a. The Sixth and Seventh Circuit decisions cited by petitioner address a different issue. See Pet. 11-13 (discussing *United States* v. *Esterman*, 324 F.3d 565 (7th Cir. 2003), and *United States* v. *McGahee*, 257 F.3d 520 (6th Cir. 2001)). Both *Esterman* and *McGahee* involve applications of the holding in *United States* v. *Sanders*,

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[5] Petitioner errs in relying (Pet. 7-9) on the title of the statute, various secondary-source definitions of money laundering, and the legislative history as a basis for reading an element into the statute that its text does not contain. See, *e.g.*, *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (title of a statute cannot limit the plain meaning of the text); *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994) (legislative history). Moreover, the legislative history cited by petitioner (Pet. 9) for his create-an-appearance-of-legitimate-wealth requirement goes on to indicate that money laundering breaks the chain of evidence (the "paper trail") between a person and certain funds "in order for such person to evade the payment of taxes, avoid prosecution, or obviate any forfeiture of his illegal drug income or assets." *Ibid.* (quoting H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986)). None of those purposes requires more than was done here—attempting to conceal illicitly obtained cash in order to transport it through a courier out of the country. More importantly, none of those purposes (or the creation of the appearance of legitimate wealth) need be proved to violate the statute; instead, the statute reaches conduct that Congress thought would facilitate attainment of those purposes.

929 F.2d 1466 (10th Cir.), cert. denied, 502 U.S. 846 (1991), that a person who merely spends his own money in an open or notorious way, or deposits it into an account in his own name, cannot be guilty of concealment money laundering. *Id.* at 1472. In *Sanders*, the defendant was convicted of concealment money laundering under 18 U.S.C. 1956(a)(1)(B)(i) based on her purchase of two vehicles with drug proceeds. 929 F.2d at 1471.[6] In reversing her conviction, the court of appeals observed that the money laundering statute is not a mere "money spending statute"; rather, its purpose is to reach commercial transactions "intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities." *Id.* at 1472.

The issue in cases like *Sanders* is whether the defendant merely spent or invested his money, in contrast to engaging in transactions in order to conceal or disguise the nature, source, or ownership of the funds. *Esterman* and *McGahee* rely on that distinction and not on a principle that concealment must aim at generating an appearance of legitimate wealth. In *Esterman*, the Seventh Circuit concluded that proof that a defendant transferred fraud proceeds to a personal bank account in his own name, and used the money for retail purchases, was not sufficient to show intent to conceal. 324 F.3d at 571. The court reasoned that, to ensure that every movement of illicit proceeds does not become a money laundering offense, there must be "concrete evidence of intent to disguise or conceal" such as state-

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[6] The language of 18 U.S.C. 1956(a)(1)(B)(i) is identical to that in 18 U.S.C. 1956(a)(2)(B)(i) at issue here.

ments by the defendant, unusual secrecy, careful structuring, use of legitimate businesses or third parties, or unusual financial moves. *Id.* at 573.

The court did not hold that creating the appearance of legitimate wealth is necessary to prove a design to disguise or conceal. To the contrary, the court listed several examples of circumstances that would constitute concealment money laundering (as opposed to mere money spending), and only one of those examples would necessarily create such an appearance. See *Esterman*, 324 F.3d at 573 (listing "unusual secrecy surrounding transactions, careful structuring of transactions to avoid attention, folding or otherwise depositing illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction").

In *McGahee*, the defendant used a business account to disburse fraudulently obtained proceeds by writing checks to himself, to "cash," and to his mortgage company. 257 F.3d at 526-527. The Sixth Circuit concluded that such conduct was "not intended to conceal how he got the funds, but merely to convert them to liquid assets," *id.* at 528, and further observed that the transactions were not "designed to create the appearance of legitimate wealth." *Ibid.* Rather, the court observed, "the funds were transmitted in a direct, ordinary, and open manner." *Ibid.* The court thus concluded that the defendant's conduct "did not evidence a design to conceal the proceeds of illegal activity." *Ibid.*

While the Sixth Circuit did note that evidence of an intent to create the appearance of legitimate wealth would be one way of establishing an intent to conceal, *McGahee*, 257 F.3d at 528, the court did not suggest

such proof is the only way to do so. Indeed, relying on a decision by the Tenth Circuit, the Sixth Circuit listed examples (very similar to those suggested by the Seventh Circuit in *Esterman*) of various ways the government could prove an intent to conceal. *Id.* at 527-528 (citing *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1475-1476 (10th Cir. 1994)).

b. Nor, contrary to petitioner's assertion (Pet. 12-13), does the decision in this case conflict with *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994). In *Dimeck*, the defendant was convicted of a conspiracy to commit concealment money laundering based on evidence that he transported drug proceeds in a box and gave them to a co-conspirator, who was then to transport them out of state to give to a drug supplier. *Id.* at 1241, 1242-1243. In reversing, the Tenth Circuit concluded that this evidence was insufficient to prove an effort to conceal or disguise the money being transported. See *id.* at 1247 ("The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering."). The *Dimeck* court did state that the "money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises," and that it was that step that was missing in *Dimeck*. *Ibid.* But the court did not hold that such proof was the only additional proof that could have satisfied the statute.[7]

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[7] In addition, in describing its earlier decision in *Garcia-Emanuel*, the *Dimeck* court stated that *Garcia-Emanuel* had observed that the statute requires proof of a "desire to create the appearance of legitimate wealth or otherwise to conceal the nature of the funds so that they

Moreover, as the en banc court noted below in distinguishing *Dimeck*, the defendant in that case made only "a minimal attempt at concealment," in contrast to the elaborate concealment of the "nature, the location, the source, the ownership, or the control" of the funds established here. Pet. App. 15a. The degree of concealment is significant because, as the Tenth Circuit itself noted in *Garcia-Emanuel*, 14 F.3d at 1475, "actions that are merely suspicious and do not provide substantial evidence of a design to conceal will not alone support a conviction." Thus, although some *language* in *Dimeck* could be read to preclude prosecutions absent a specific showing that the defendant has "attempt[ed] to legitimize [the] proceeds," 24 F.3d at 1247, the decision itself would not bar prosectuions where, as here, the defendant's actions reveal a design to frustrate any discovery of the cash. The decision in *Dimeck* thus does not conflict with the decision below.[8]

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might enter the economy as legitimate funds." *Dimeck*, 24 F.3d at 1245. But *Garcia-Emanuel* indicated that there were multiple ways the government could prove a design to conceal. See *Garcia-Emanuel*, 14 F.3d at 1475-1476 ("[A] variety of types of evidence have been cited by this and other circuits as supportive of evidence of intent to disguise or conceal. They include, among others, statements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves culminating in the transaction; or expert testimony on practices of criminals.") (footnotes omitted).

[8] Nor, contrary to petitioner's claim (Pet. 11, 14), does the decision of the Second Circuit in *United States* v. *Ness*, 466 F.3d 79 (2006), petition for cert. pending, No. 06-1604 (filed June 1, 2007), evidence a conflict. The Second Circuit stated, without analysis of the facts of *Dimeck*, that that case (and the panel's decision in this case) would

Indeed, on the facts of *Dimeck*, the Fifth Circuit would likely reach the same conclusion as the Tenth Circuit did in *Dimeck*. In reaching its conclusion, the *Dimeck* court relied on an earlier Fifth Circuit decision, *United States* v. *Gonzalez-Rodriguez*, 966 F.2d 918 (1992), that was not overruled by the en banc court here. In *Gonzalez-Rodriguez*, the defendant was stopped by law enforcement officers in the airport and asked if she was carrying any cash; she truthfully responded that she had $8000; she produced it for the officers to count; and she made no false statements to the officers about the money. *Id.* at 920, 925-926. On those facts, the Fifth Circuit held that there was insufficient evidence that her transportation of the money was "designed to conceal or disguise" any of the attributes of the funds listed in the money laundering statute. *Id.* at 925-926.

3. There is no connection between the legal issue before the Court in *United States* v. *Santos*, cert. granted, No. 06-1005 (Apr. 23, 2007), and the issue raised by petitioner. As petitioner notes (Pet. 6), the issue in *Santos* concerns the meaning of the word "proceeds," as used in the money laundering statutes, a dis-

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preclude a concealment prosecution when a defendant merely shipped cash from one place to another, because it read *Dimeck* to require a showing that "the transaction or transportation was designed to give unlawful proceeds the appearance of legitimate wealth." *Ness*, 466 F.3d at 81. But neither the Second Circuit nor the en banc court below would uphold a prosecution based on mere transportation of funds from one drug dealer to another. Rather, as the *Ness* court stated, proof of the design-to-conceal element turns on the "level of secrecy" involved, and it relied in that case on the use of clandestine meetings, coded language, and avoidance of a paper trail. *Ibid.* The court reserved cases where the transfer of funds "is surrounded by less elaborate strategems or a lesser measure of secrecy." *Ibid.* Thus, *Ness* is entirely reconcilable with *Dimeck*, where minimal concealment took place.

crete question of statutory interpretation not presented here. Petitioner did not contend in the lower courts that the funds were not proceeds, and he does not do so now. Insofar as petitioner suggests (Pet. 17) that review of this case should be undertaken along with *Santos*, that suggestion is misguided: unlike *Santos*, where there is a clear, explicit, and intractable conflict among the courts of appeals concerning the meaning of the statutory term "proceeds," here the cases cited by petitioner involve holdings on whether particular facts established a design to conceal or disguise, which is the type of issue on which courts necessarily draw distinctions based on varying circumstances. Despite pointing to language in some opinions linking money laundering to the creation of "the appearance of legitimate wealth," petitioner can identify no inconsistent results or inevitable disagreements on outcomes on the issue he raises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

(4)

No. 06-1456

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Our opening petition apparently put the government in a box. As no less than six federal appellate judges have expressly recognized, there is a "circuit split" (Pet. App. 39a) concerning whether merely hiding illegally-obtained funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. In opposing further review, the government ordinarily would have conceded the circuit court disagreement but suggested other grounds to avoid review, such as the need for additional time for other courts to consider the question or the need to select a better vehicle for consideration of the issue. This Court, however, just granted review where the government claimed, as we do here, that "a circuit conflict is particularly problematic when, as here, the courts of appeals disagree on the substantive meaning of a widely used federal criminal statute." (Pet. at 6 (quoting *Santos* Gov't Pet. in No. 06-1005, at 25-26).) And, given that the decision below is a published en banc opinion that directly addresses the question presented, there is no conceivable vehicle objection to granting review here.

Unable to dispute the importance of a circuit conflict on the meaning of the money laundering statute and unable to dispute that the issue is squarely presented here, the government opposes review by denying the existence of a conflict in the courts of appeals. But the government's brief confirms rather than denies the circuit court disagreement. The government does not even address the leading case on the other side of the split, *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), until page 16 of its 19-page brief, and addresses in a footnote another case expressly noting the conflict, *United States v. Ness*, 466 F.3d 79 (2d Cir. 2006), *petition for cert. filed*, No. 06-1604 (June 1, 2007). As we show below, an objective assessment of the relevant circuit deci-

sions confirms the views of the six appellate judges who have noted the circuit discord.

Review is warranted.

I. The En Banc Court of Appeals Decision Incorrectly Expands the Scope of the Money Laundering Statute

As explained in our opening petition (at 7-11), the relevant money laundering provision, 18 U.S.C. § 1956(a)(2)(B)(i), requires the government to prove that petitioner transported funds to conceal or disguise the funds' attributes in order to create the appearance of legitimate wealth.[1] Although the methods for laundering illegal funds are varied and numerous, they are all captured by the Congressional prohibition of "conceal[ing] or disguis[ing]" the various attributes of the funds tying them to illegality: their "nature," "location," "source," "ownership," or "control." 18 U.S.C. § 1956(a)(2)(B)(i).

The government suggests that petitioner does not prevail even under the reading of the statute we advance. (U.S. Br. 11.) The government notes that "United States dollars are as negotiable as Mexican pesos" in Mexico and thus "petitioner's transportation of the money into Mexico would have converted it into useable funds." *Id.* But even if petitioner could have spent the illegally obtained dollars in Mexico, that would not at all establish a design to create the appearance of legitimate wealth—he would just be spending drug money. Spending stolen money is not money laundering. (*See* U.S. Br. 13-14.) Contrary to the government's view, transporting illegal funds abroad is not money laundering

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[1] For the full text of the statute, see Pet. App. 63a-74a. The concealment provision reads, "knowing that such transportation, transmission, or transfer is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." § 1956(a)(2)(B)(i).

because that act alone does not establish that the defendant knew that the purpose of the transportation was to conceal or disguise the money's attributes.

The Solicitor General concedes that the "common understanding of what it means to 'launder' money" is to "disguis[e] funds for the purposes of creating the appearance of legitimate wealth." (U.S. Br. 12.) Nevertheless, the government urges a far more expansive reading of the criminal statute, but elects to address most of our substantive points in a footnote. (U.S. Br. 13 n.5.). Our opening petition anticipates and refutes this reading (Pet. 7-11 (government's view ignores both statutory text and purpose)), and we reserve a more thoroughgoing discussion of the merits for later briefing should this Court grant review. (*See also* Amicus Curiae Brief of National Association of Criminal Defense Lawyers 3-12 (explaining errors in decision below).)

II. The Decision of the En Banc Court of Appeals Deepens an Existing Circuit Split

The Solicitor General's sole reason for opposing certiorari is that the circuit courts are not in conflict. (U.S. Br. 10, 13-19.) The en banc court below held that the "conceal or disguise" element of international transportation money laundering, 18 U.S.C. 1956(a)(2)(B)(i), does not require proof of a design to create the appearance of legitimate wealth. (Pet. App. 12a.) Instead, the court held that "simply taking steps to hide illicit funds is sufficient to prove concealment." (Pet. App. 13a.) In the government's view, this ruling (and similar rulings by the Second, Third, and Eleventh Circuits) does not conflict with rulings by other courts of appeals. (U.S. Br. 13.) That view is wrong.

1. The leading case in conflict with the decision below is *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994). *Dimeck* involved a covert transportation of drug proceeds. *Id.* Dimeck, a courier, used his company van and a company

box to secretly deliver drug proceeds to another driver, whom he met in a hotel room for the hand-off. *Id.* at 1242-43. He suggested to the second driver, Moore, that the proceeds be concealed in a suitcase or taped box before traveling on the second leg of the trip. *Id.* at 1243. He was arrested and charged with conspiracy to violate 18 U.S.C. § 1956(a)(1)(B)(i). *Id.* at 1241. At trial, the United States urged, and the jury found, that the "conceal or disguise" element of international transportation money laundering was met by "Dimeck's actions in telling Moore to tape up the box and inquiring . . . about any markings on the box that would tie the money to him after it was seized by police." *Id.* at 1243.

The Tenth Circuit reversed the conviction. 24 F.3d at 1246. The court held that the concealment surrounding the transportation was not designed to "confuse or mislead anyone as to the characteristics of those proceeds, or to assist in allowing these proceeds to enter into legitimate commerce." *Ibid.* Because the illegal funds, though transported secretly, were to be *received* "as illegal funds" (*i.e.*, with no concealment or disguise of their illegal attributes) the concealment fell outside the scope of the statute. *Id.* at 1246. The court held that hiding the money would not sustain a conviction under § 1956 because "[t]he money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to *legitimize their proceeds* so that observers think their money is derived from legal enterprises." *Id.* (emphasis added). "The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering." *Id.* at 1247.

In the decision below, the Fifth Circuit, on facts and arguments paralleling *Dimeck*, reached the opposite result. Like *Dimeck*, the case below involved (1) a courier, (2) transporting money, (3) that was obtained from illegal drug

activity, (4) who took steps to hide the money during transportation. (Pet. App. 2a-6a, 10a-11a.) As in *Dimeck*, the United States argued that the courier's secretive actions while transporting the money were "designed to conceal or disguise the nature," "location," "source, ownership, and control" of the proceeds. Pet. App. 11a. But the Fifth Circuit here, in conflict with the Tenth Circuit in *Dimeck*, accepted the government's urgings and rejected the requirement that there be "proof that the defendant's acts created the appearance of legitimate wealth or converted dirty money into clean." *Id.* at 12a. Instead, the court held that "simply taking steps to hide illicit funds is sufficient to prove concealment" (Pet. App. 13a), a holding directly at odds with *Dimeck*'s holding that the money laundering statute only reaches those "drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises." 24 F.3d at 1246.

The Solicitor General denies that *Dimeck* and the decision below conflict, emphasizing that in *Dimeck* the courier made only a "minimal attempt at concealment." (U.S. Br. 17; *see also* Pet. App. 15a.) But the ruling in *Dimeck* in no way turns on the level of secrecy involved. *All* secrecy during transportation fails to show the required "concealment" under *Dimeck*'s reasoning, because, no matter its degree, such concealment is not aimed at creating the appearance of legitimate wealth. The government concedes this point. (U.S. Br. 17.) ("[S]ome language in *Dimeck* could be read to preclude prosecutions absent a specific showing that the defendant has 'attempted to legitimize the proceeds.'" (emphasis removed)).[2]

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[2] The government's "minimal attempt at concealment" distinction between *Dimeck* and the decision below has no statutory basis. Although initially emphasizing the "plain reading of the statutory text" (U.S. Br. at 10), the government nowhere explains where in the statute the "minimal

Confirming that the conflict with *Dimeck* is plain, no fewer than six circuit judges have expressly stated that the courts are divided on the question presented. The "circuit split" was explicitly noted by Judge Smith, who wrote the en banc dissent below (and called for the Attorney General to confess error in this case) (Pet. App. 44a):

> [T]he majority ignores the overwhelming caselaw, in both this court and our sister circuits, to the effect that the statute requires a design to create the appearance of legitimate wealth. It is astounding that the majority rewrites the law in this circuit, and creates a circuit split, in such a cavalier and intellectually imprecise manner.

Pet. App. 38a-39a (Smith, J., dissenting, joined by DeMoss, Dennis, JJ.) (citing, *e.g.*, *Dimeck*, 24 F.3d at 1246). The Solicitor General omits mention of these judges' identification of the "circuit split."

Likewise, the Second Circuit expressly recognized the circuit court disagreement in *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006) (Calabresi, J.), *petition for cert. filed*, No. 06-1604 (June 1, 2007). There, the court admitted that its rejection of the rule that "the concealment element is satisfied only when the transaction or transportation at issue was designed to give unlawful proceeds the appearance of legitimate wealth" was in conflict with "some other courts of appeals," including the Tenth Circuit. *Id.* (citing *Dimeck*). Although the Solicitor General suggests that the Second Circuit did not sufficiently analyze "the facts" in *Dimeck*, as ex-

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level of secrecy" criteria is included. It is not. The statute criminalizes transportation undertaken with any "design" to "conceal or disguise" the "nature," "source," and so on of the illegal proceeds. The crime does not at all turn on whether the design to conceal is "minimal," "significant," or any other quantitative term.

plained above *Dimeck* turns on a statutory reading squarely at odds with both the decision below and the Second Circuit.

A conflict between the decision below and *Dimeck* is itself sufficient to merit this Court's review of the issue. In *Santos*, this Court recently granted certiorari where a single circuit, the Seventh Circuit, created a conflict with the other circuits' interpretation of "proceeds" under the very statute at issue here. *United States v. Santos*, *cert. granted*, No. 06-1005 (Apr. 23, 2007). The government urged review in *Santos* even though its holding was only in direct conflict with two other circuits, *Santos* Gov't Pet. at 22, characterizing *any* split over the "substantive meaning" of the money laundering statute as "particularly problematic." *Id.* at 26. So too, in this case, the conflict between *Dimeck* on one side and the en banc decision below and *Ness* on the other side is sufficient to warrant this Court's attention.[3]

2. Furthermore, as the petition explains (at 11-16), the circuit court conflict over the meaning of "designed" "to conceal" extends well beyond *Dimeck*. The First, Sixth and Seventh Circuits are also in direct conflict with the decision here, a decision that accords with the views of the Second and Eleventh Circuits.

As noted in the petition, the First Circuit in *United States v. Morales-Rodriguez*, 467 F.3d 1 (1st Cir. 2006), recently adopted *Dimeck*'s rule that "mere transportation of concealed drug money [does] not constitute money laundering because the money laundering statute 'was designed to punish those . . . who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.'" *Id.* at 13. In that case, the court found conspiracy to launder using the *Dimeck* test.

---

[3] The circuit court disagreement between the Fifth Circuit and the Tenth Circuit creates particularly acute practical problems because these two circuits make up a significant, adjacent portion of the southern border.

("Morales did far more than simply transport ill-gotten wealth" because his repeated transfers of money between three bank accounts were "complicated machinations [that] were intended to create the appearance of legitimate wealth."). *Ibid.* The government ignores this case.

The conflict is also clear with the Sixth and Seventh Circuit. In *United States v. McGahee*, 257 F.3d 520 (6th Cir. 2001), the court reversed a money laundering conviction premised on payments made from a bank account containing illegal proceeds. The court based its decision on its ruling that the purpose of the transactions was not "to create the appearance of legitimate wealth" but rather to "merely to convert [illegal funds] to liquid assets." *Id.* Similarly, in *United States v. Esterman*, 324 F.3d 565 (7th Cir. 2003), the court reversed the money laundering conviction of a defendant who transferred money from a joint account he shared with a Russian business partner into a series of personal accounts in the United States. *Id.* at 570. Because there was an "absence of efforts to transform ill-gotten funds into apparently innocent assets or funds that the criminal can use later with impunity," *id.* at 572, the court ruled there was no concealment.

The Solicitor General points out that both *Esterman* and *McGahee* are applications of the holding in *United States v. Sanders*, 929 F.2d 1466 (10th Cir.), *cert denied*, 502 U.S. 846 (1991). (U.S. Br. 13-14.) And, indeed, the two cases applied the *Sanders* test: "whether the defendant merely spent or invested his money" or whether he "engag[ed] in transactions in order to conceal or disguise" the illegal attributes of the money. *Id.* at 14. But that test is simply a specific application of the basic requirement that a transaction be for the purpose of creating the appearance of legitimate wealth, and not for another purpose (which in these particular cases was mere spending or investing). *Ibid.* Both courts ruled that the evidence showed that the defendants'

purpose in conducting the transactions was simply to obtain goods and services, not to hide an attribute of the money that would connect it to crime. Here (and in *Dimeck*), the purpose of the transportation, according to the government's own expert, was to repay a drug debt, not to conceal dirty attributes in order to pass the money off as legitimate. *Esterman*, *McGahee*, and *Sanders* all therefore directly conflict with the decision below, in which the court ruled that the government need not prove that the purpose of the transportation was to create the appearance of legitimate wealth.

The Solicitor General also argues that *McGahee* and *Esterman* hold that creating the appearance of legitimate wealth is just one way to prove the "conceal or disguise" element of international transportation money laundering. (U.S. Br. 15.) He asserts that the "conceal or disguise" requirement is met if there is "unusual secrecy surrounding the transactions, careful structuring of transactions to avoid attention, folding . . . illegal profits into the bank account or receipts of a legitimate business, use of third parties to conceal the real owner, or engaging in unusual financial moves culminating in a transaction." *Id.* (quoting *Esterman*, 324 F.3d at 573). *Esterman*, however, did not hold that those acts, on their own, constituted money laundering. *See id.* Instead, the court used these as examples of circumstantial evidence that could show a design to create the appearance of legitimate wealth.

* * *

The government's sole reason for opposing review here is the absence of a conflict in the circuits. But, as the dissenting judges below and a panel of the Second Circuit have expressly observed, the circuits do in fact disagree over whether hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction. There is no dispute that a circuit conflict on a substantive element of the money laundering statute war-

rants this Court's prompt attention and no dispute that the en banc decision below provides an excellent vehicle for resolving the circuit court disagreement. Review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction.

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Adam K. Weinstein, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369 (Winter 1988) 3, 4

Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151 (2006) 5

Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517 11

John K. Villa, *Banking Crimes* (2001) 7, 11

Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703 (1993) 5

Marino-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003) 5, 7, 8, 9, 10, 11

Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited August 1, 2007) 9

NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited August 1, 2007) 2

Norman Abrams & Sara Sun Beal, *Federal Criminal Law & Its Enforcement* (3d ed. 2000) 4

Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721 (2003) 4

Scott J. Golde & Winston E. Clavert, *A Practioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312 (2006) 4

Teresa A. Adams, Note & Comment, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531 (2000) 10

IN THE

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.2.

House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. Consistent with these goals, NACDL has previously criticized illogical and improper judicial expansions of the money laundering statute at issue in this petition for certiorari, 18 U.S.C. § 1956.[2]

The petition in *Cuellar v. United States* raises substantially similar issues regarding 18 U.S.C. § 1956 as in another petition pending before the Court, *Ness v. United States*, No. 06-1604. Accordingly, Amicus is filing substantially similar briefs in support of both petitions.

INTRODUCTION

Amicus agrees with Petitioner that a writ of certiorari should be granted in this case. Amicus submits this brief to elaborate on the reasons why, in its view, the conflict among the circuits on the meaning of the "conceal or disguise" clause of the principal federal money laundering statute, 18 U.S.C. § 1956(a), is an important issue that merits resolution by this Court.

The expansive and unwarranted interpretation adopted by the Courts of Appeals for the Second, Third, Fifth, and Eleventh Circuits improperly expands the scope of an already broad statute far beyond its intended reach.

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[2] *See* NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited August 1, 2007).

Section 1956 has become a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct, without any showing of the aggravated societal harm that the money laundering statute was designed to redress. If this over-expansive interpretation is allowed to stand, criminal defendants unjustly will face longer sentences and will be forced to weigh the potential for such sentences in considering whether to plead guilty.

These grave concerns regarding the scope of the money laundering statute, coupled with the dangers to the accused that come from the unpredictability and lack of uniformity in the law that a deep circuit split presents, militate strongly in favor of certiorari. Review by this Court is necessary both to clarify the law and to restore the meaning of "conceal" in § 1956 to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF "CONCEAL" EXPANDS 18 U.S.C. § 1956 BEYOND CONGRESS'S INTENT AND CREATES UNJUST RESULTS.

A. The Money Laundering Statute Is Subject to Expansive Interpretations That Invite Prosecutorial Over-Reliance.

The Money Laundering Control Act of 1986 ("MLCA"), *codified at* 18 U.S.C. §§ 1956–1957, was the first federal statute to criminalize money laundering per se. *See* Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369, 372–73

(Winter 1988). As enacted, the MLCA was and is a powerful tool for prosecutors. Compared with RICO and various criminal conspiracy statutes, prosecutors can bring cases relatively easily under § 1956, and its long list of predicate offenses facilitates convictions.[3] *See, e.g.*, Norman Abrams & Sara Sun Beal, *Federal Criminal Law & Its Enforcement* 397 (3d ed. 2000).

Although the scope of the MLCA was broad when enacted, many courts since have interpreted the statute to capture conduct substantially beyond traditional money laundering. *See* Scott J. Golde & Winston E. Clavert, *A Practioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312, 312 (2006) ("The federal statutes not only cover the classic money laundering scenario where an individual takes steps to make illegally earned assets appear legitimate, they also affect a far broader range of conduct that many would not consider 'laundering' money."); Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721, 723 (2003) ("The scope of the MLCA can be rather broad. In fact, the statute can reach so far as to impose liability on individuals, such as attorneys, who were not originally involved in any illegal activity, but later became involved in post-illegal activity.").

Prosecutors accordingly may seek to "tack on" money laundering charges where the alleged "laundering" conduct is incidental to or virtually indistinguishable from the underlying offense. More broadly, they may seek to use the money laundering statutes to punish conduct well beyond

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[3] Section 1956(c)(7) provides a lengthy list of offenses that qualify as "specified unlawful activity," including the definition of racketeering found in § 1961(1) (which includes, *inter alia*, mail and wire fraud).

those statutes' proper realm. *See* Marino-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 414 (2003) ("People committing federal offenses that can be predicates for money laundering (such as drug trafficking), for example, can now be charged with money laundering for doing almost anything in the world with money from specified unlawful activity, because of the watered down interpretation of the anti-money laundering statutes."); *see also* Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151, 152 (2006) ("While being a leader in fighting money laundering activity, the U.S. Department of Justice has used new statutes creatively to expand prosecutorial power beyond its intended purpose."). So broad is the money laundering statutes' potential scope that legitimate conduct may be threatened. *See* Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703, 723 (1993) ("[A]dditional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions.").

B. Many Courts Consistently Have Expanded Specific Terms of 18 U.S.C. § 1956, Encouraging Broad, Unintended, and Unfair Applications of the Statute.

As the Petition for Certiorari demonstrates, the principal federal money laundering statute, 18 U.S.C. § 1956, and in particular its "conceal" prong,[4] have been

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[4] A defendant may be convicted under § 1956(a)(1) or (a)(2) if it is shown, *inter alia*, that the defendant knew the transaction, (a)(1), or the international transportation, (a)(2), was "designed in whole or in part—to

interpreted more broadly than Congress intended. *See* Pet. for Cert. 8–11. Many courts—including the Fifth Circuit in the decision below—have adopted extraordinarily expansive constructions of the word "conceal," interpreting it to encompass the mere hiding of funds.

For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without evidence that the cash transportation was designed to give the appearance of legitimate wealth. *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006), *petition for cert. filed* June 1, 2007; *see also United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) (attorney's placement of client's illicitly-obtained cash into personal briefcase, which he attempted to transport by car to his law office, satisfied concealment prong); *United States v. Hurtado*, 38 Fed. Appx. 661 (2d. Cir. 2002) (facts indicating only that money being transported into the United States was hidden in luggage bags, without evidence that the transportation was meant to make the money appear legitimate, sufficed to show a violation of § 1956). Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. *See United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 661 (8th Cir. 1992), *aff'd on other grounds*, 511 U.S. 513 (1994) (deposit by "head shop" owner of shop proceeds into business account); *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling proceeds into family business account bearing defendant's name); *see also United States v. Shepard*, 396 F.3d 1116, 1121 (10th Cir.) ("[D]epositing illegal proceeds into the bank account of

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conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *See also* § 1956(a)(3)(B).

a legitimate business may support the inference of an intent to conceal."), *cert. denied*, 545 U.S. 1110 (2005).

The breadth with which some courts have construed the term "conceal" is illustrative of a larger trend among the federal courts to interpret provisions in § 1956 in an expansive fashion. For example, to be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, *inter alia*, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. *See, e.g.*, *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money to courier "involved the movement of funds by wire or other means"); *United States v. Wydermyer*, 51 F.3d 319, 326–27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by other means"). According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." John K. Villa, *Banking Crimes* § 8:10 (2001). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use [section] 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Cuellar, 93 J. Crim. L. & Criminology at 348.

Another statutory term that some courts have construed expansively is the "proceeds" element. Section 1956(a)(1) requires, among other things, that a prosecutor prove that the defendant knew the property involved in the financial transaction was the *proceeds* of some form of unlawful activity. Although the statute does not define this term, some courts have interpreted it broadly. *See United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (defining "proceeds" as "'what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue.'" (citation omitted)). Contrary to the plain language of the statute, "proceeds" has even been held to include worthless items. *See United States v. Akintobi*, 159 F.3d 401, 403–04 (9th Cir. 1998) (holding that, although the term "may refer to something of value," it "has the broader meaning of 'that which is obtained . . . by any transaction,'" and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed" (citation omitted)); *see also United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included a "fraudulently obtained line of credit, which results in an artificially inflated bank balance").

Some Circuits also have interpreted "proceeds" to include gross receipts of the specified criminal activity rather than only the net income of that activity; consequently, they construe the statute broadly to prohibit reinvestment of gross receipts as expenses of the criminal enterprise. *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir.), *cert. denied*, 543 U.S. 978 (2004); *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004), *vacated and rev'd on other grounds*, 544 U.S. 945 (2005), *reinstated in relevant part*, Nos. 03-1441 & 03-

1442 (May 20, 2005). *But see Santos v. United States*, 461 F.3d 886, 893–94 (7th Cir. 2006). The Court recently granted certiorari to resolve the circuit split on this issue. *See United States v. Santos*, No. 06-1005 (cert. granted Apr. 23, 2007).

Through such expansive interpretations of terms that otherwise would appear to limit application of the statute,[5] many courts now punish as "money laundering" conduct that bears virtually no relation to that concept as it is commonly understood. *See United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem doomed to failure." Mary McNamara & Edward W. Swanson, *Money Laundering: How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited August 1, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of 1956 and 1957 should not obscure the prevailing pattern in the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended

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[5] *See also United States v. Valuck*, 286 F.3d 221, 226 (5th Cir. 2002) (announcing that the Fifth Circuit "subscribes to a broad interpretation of the word 'promote' within the context of section 1956"); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997) (concluding that *United States v. Lopez*, 514 U.S. 549 (1995), "did not elevate the government's burden under the money laundering statute," and that "[t]he government need only prove that the individual subject transaction has, at least, a de minimis effect on interstate commerce").

to favor prosecutors." Cuellar, 93 J. Crim. L. & Criminology at 343.[6]

C. Expansive Interpretations of § 1956 Have Significant Negative Ramifications for the Criminal Justice System.

These concerns are not merely abstract. An overbroad reading of the principal federal money laundering statute has severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole.[7] Section 1956 comes with harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[ ] offense levels for money laundering more closely to the underlying conduct," *U.S. Sentencing Guidelines Manual* app. C, amend. 634, reason for amend. (2006), even today money

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[6] Compounding the problem, the *United States Attorneys' Manual* imposes limited obligations on prosecutors to notify the Department of Justice before pursuing money laundering charges, "in sharp contrast to even the broadly interpreted and applied RICO statutes which require authorization prior to prosecution under any circumstances." Teresa A. Adams, Note & Comment, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531, 569 (citing *U.S. Attorneys' Manual* §§ 9-150.310–.330, 9-110.101).

[7] In the most recent year for which statistics are available, nearly one thousand defendants were convicted under § 1956—62% of all defendants convicted of money-laundering related crimes in the federal system. *See 2007 National Money Laundering Strategy* 94 tbl. 16 (App. B), *available at* http://www.treas.gov/press/releases/docs/nmls.pdf (last visited August 1, 2007) (citing Dep't of Justice Office of Policy and Legislation, Crim. Div. (2004)).

laundering charges can result in a sentence far greater than that for the predicate offense alone when the predicate offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); *see also* Cuellar, 93 J. Crim L. & Criminology, at 348–49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants").[8] Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense, even if no other sentencing enhancements apply. U.S.S.G. § 2S1.1(b)(2)(B).

In white-collar criminal cases, in particular, the prospect of a higher sentence allows prosecutors to extract plea bargains and forfeitures that might not otherwise be forthcoming and that may well not be in the interest of justice. *See* Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534–35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks a heavier sentence than does an indictment (for the same conduct) without such

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[8] As explained below, even though Petitioner Cuellar's predicate conduct was drug-related, had he been convicted under the bulk money smuggling statute, 31 U.S.C. § 5332 (under which he was not even charged, *see United States v. Cuellar*, 478 F.3d 282, 300 n.10 (5th Cir. 2007) (en banc) (Smith, C.J., dissenting))—the charge most directly applicable to his conduct—he would have faced a statutory maximum one-fourth that of § 1956.

a charge, prosecutors have a great incentive to use it as a bargaining chip in pretrial conferences. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused—and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place (i.e., "traditional" money laundering). Instead, prosecutors and courts have interpreted § 1956 to embrace conduct—as here, "concealment" in an automobile—that comes nowhere close to presenting the dangers to society that the money laundering statute was designed to address. Defendants, including Petitioner here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

The continued broad and improper application of § 1956 has real-world consequences for defendants convicted under it, as well as for defendants threatened with money laundering charges. The Fifth Circuit's further expansion of § 1956 in this case, if left unreviewed, would further increase prosecutorial power at the expense of fairness.

II. MANY DEFENDANTS WHO SUFFER OVERBROAD APPLICATION OF § 1956 WOULD BE SUBJECT TO PROSECUTION UNDER OTHER CRIMINAL STATUTES IN ANY EVENT.

If this Court were to grant certiorari and reverse the Fifth Circuit's decision, it would not deprive the government

of the means to punish international financial crimes. On the contrary, numerous other money laundering statutes, cash reporting statutes, and anti-smuggling statutes[9] provide prosecutors ample tools with which to charge defendants who carry concealed money across borders.

Petitioner's case is illustrative. As the dissent in the Fifth Circuit pointed out, and as Petitioner himself has conceded, Cuellar's conduct is squarely captured by the bulk cash smuggling statute, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it. *See United States v. Cuellar*, 478 F.3d 282, 299–300 (5th Cir. 2007) (en banc) (Smith, C.J., dissenting) (explaining that the legislative history of § 5332 demonstrates that Congress did not intend §1956 to capture conduct such as petitioner Cuellar's). If charged under § 5332, Cuellar would have faced a statutory maximum of five years in prison. Instead, having been accused and convicted of "money laundering," Cuellar was exposed to a twenty-year statutory maximum sentence under § 1956.[10]

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[9] In addition to §§ 1956 and 1957, these include 18 U.S.C. § 1960 (prohibition of illegal money transmitting businesses); 18 U.S.C. § 982 (criminal forfeiture after conviction under, *inter alia*, §§ 1956, 1957, 1960); 31 U.S.C. § 5313 (reports on domestic coin and currency transactions); 31 U.S.C. § 5316 (reports on exporting and importing monetary instruments); 31 U.S.C. § 5317 (search and forfeiture of monetary instruments); 31 U.S.C. § 5324 (structuring transactions to evade reporting requirement prohibited); 31 U.S.C. § 5332 (bulk cash smuggling into or out of the United States).

[10] Petitioner was sentenced to a term of seventy-eight months, with supervised release of three years immediately following. Pet. for Cert. App. 58a-59a.

Amicus does not dispute the need for an anti-money laundering strategy, or for an anti-money laundering statutory scheme. Rather, Amicus contends that the breadth of § 1956, as interpreted by the Fifth Circuit, does not conform to the language of the statute or to Congress's intent and leads to unintended and unfair results. This Court therefore should grant certiorari to resolve the split among the circuits and to prevent the improper expansion of § 1956.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Cuellar's petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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APPENDIX A

CHRONOLOGICAL LIST OF DOCKET ENTRIES

I. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS (SAN ANGELO)

(Case No. 6:04-cr-00055) ALL DEFENDANTS

07/20/2004 COMPLAINT as to Humberto Fidel Regalado Cuellar (1). (mrr)[6:04-mj-00099] (Entered: 07/20/2004)

08/18/2004 INDICTMENT as to Humberto Fidel Regalado Cuellar (1) count(s) 1. (mrr) (Entered: 08/19/2004)

09/01/2004 Minute Entry for proceedings held before Judge Nancy M Koenig : Arraignment as to Humberto Fidel Regalado Cuellar (1) Count 1 held on 9/1/04., Plea entered by Humberto Fidel Regalado Cuellar : Not Guilty on count 1. Trial set for 10/4/04. Deft waived reading of indictment. (Tape #1348(2266-3080).)(Interpreter Isabel McSpadden.) (mrr) (Entered: 09/01/2004)

10/12/2004 MOTION to Deny Govt's Expert Testimony as Sanction for Violations of this Court's Discovery Order, and as Alternative Sanction, Deft's Motion for Continuance by Humberto Fidel Regalado Cuellar (blr,) (Entered:

10/12/2004)

10/12/2004 ORDER denying [38] Motion to Deny Govt's Expert Testimony as Sanction for Violations of this Court's Discovery Order, and as Alternative Sanction, Deft's Motion for Continuance as to Humberto Fidel Regalado Cuellar (1) (Signed by Judge Sam R Cummings on 10/12/2004) (blr,) (Entered: 10/12/2004)

10/12/2004 Minute Entry for proceedings held before Judge Sam R Cummings : Day 1 of Jury Trial as to Humberto Fidel Regalado Cuellar held on 10/12/2004; jury impaneled; jury selected; jury sworn, Govt & Deft evidence presented; Deft detention continued; Court adjourned until 8:30 am 10/13/2004 (See document #40 for image of minute order). (Court Reporter Mechelle Daniel.)(Interpreter Isabel McSpadden.) (blr,) Modified on 10/13/2004 (blr,). (Entered: 10/13/2004)

10/13/2004 Minute Entry for proceedings held before Judge Sam R Cummings : Second Day of Jury Trial as to Humberto Fidel Regalado Cuellar held on 10/13/2004; Govt & Deft evidence concluded; final arguments; Court's charge to jury; jury deliberating; jury verdict rendered; jury trial ends; ex-

hibits returned to counsel; (Court Reporter Mechelle Daniel.) (Interpreter Isabel McSpadden.) (blr,) (Entered: 10/13/2004)

10/13/2004 JURY VERDICT as to Humberto Fidel Regalado Cuellar (1) Guilty on

Count 1. (blr,) (Entered: 10/13/2004)

10/25/2004 MOTION for Judgment of Acquittal, to Set Aside Verdict by Humberto Fidel Regalado Cuellar with Brief in Support. (blr,) (Entered: 10/25/2004)

10/26/2004 ORDER denying [49] Motion for Judgment of Acquittal as to Humberto Fidel Regalado Cuellar [(1); denying [49] Motion to Set Aside Verdict] as to Humberto Fidel Regalado Cuellar (1) (Signed by Judge Sam R Cummings on October 26, 2004) (mrr) (Entered: 10/26/2004)

11/12/2004 TRANSCRIPT of Proceedings as to Humberto Fidel Regalado Cuellar

held on 10/12/2004 Trial - Volume 1 of 2 before Judge Sam R. Cummings. Court Reporter: Mechelle Daniel. (blr,) (UNDER SEPARATE COVER) Modified on 2/17/2005 (blr,). (Entered: 11/15/2004)

11/15/2004 TRANSCRIPT of Proceedings as to Humberto Fidel Regalado Cuellar

held on 10/12/2004 Trial - Volume 2 of 2 before Judge Sam R. Cummings. Court Reporter: Mechelle Daniel. (blr,) (UNDER SEPARATE COVER) Modified on 2/17/2005 (blr,). (Entered: 11/15/2004)

01/06/2005 Minute Entry for proceedings held before Judge Sam R Cummings : Sentencing held on 1/6/2005 for Humberto Fidel Regalado Cuellar (1),; Objections to PSI heard and overruled; PSR w/addendum adopted; Deft advised of right to appeal; Deft remanded to custody; Count(s) 1, Deft committed to custody BOP 78 months; Deft placed on Supervised Release 3 years; $100.00 MSA. (Court Reporter Mechelle Daniel.) (Interpreter Isabel McSpadden.) (blr,) Modified on 1/6/2005 (blr,). (Entered: 01/06/2005)

01/06/2005 JUDGMENT Humberto Fidel Regalado Cuellar (1), Count(s) 1, Deft committed to custody BOP 78 months; Deft shall remain in custody pending service of sentence; Deft placed on Supervised Release 3 years w/standard & 2 special conditions; $100.00 MSA (Signed by Judge Sam R Cummings on 1/6/2005) (blr,) (Entered: 01/06/2005)

01/14/2005 NOTICE OF APPEAL by Humberto Fidel Regalado Cuellar (mrr) (Entered: 01/14/2005)

02/03/2005 TRANSCRIPT of Sentencing Hearing filed as to Humberto Fidel Regalado Cuellar for dates of 1/6/2005 before Judge Sam R. Cummings, re 57 Notice of Appeal - Final Judgment. Court Reporter: Mechelle Daniel. (mrr) (UNDER SEPARATE COVER) Modified on 2/17/2005 (blr,). (Entered: 02/04/2005)

02/28/2007 MANDATE of USCA (certified copy) as to Humberto Fidel Regalado Cuellar - JUDGMENT ON REHEARING EN BANC - ordered and adjudged that judgment of District Court is affirmed; Circuit Judge Smith w/whom Circuit Judge DeMoss joins dissenting; Circuit Judge Dennis dissenting; Issued as Mandate 2/26/2007 (blr) (Entered: 02/28/2007)

02/28/2007 Opinion of USCA (certified copy) in accordance with USCA judgment re 57 Notice of Appeal - Final Judgment filed by Humberto Fidel Regalado Cuellar - Cuellar's conviction is AFFIRMED; Circuit Judge Smith w/whom Circuit Judge DeMoss joins, dissenting; Circuit Judge Dennis, dissenting. (Attachments: # 1 pages

35 to end) (blr) (Entered: 02/28/2007)

II. UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(Case No. 05-10065)

9/27/05	Unopposed motion filed by Appellant Humberto Fidel Regalado Cuellar to increase oral argument time by at least 20 minutes, thereby allowing the parties at least an additional 10 minutes each [5275505-1] Date of COS: 8/31/05 Sufficient [Y/N]: y [05-10065] (agl)
11/1/05	COURT Order filed denying unopposed motion for additional argument time [5275505-1] Copies to all counsel. [05-10065] (pft)
11/7/05	Oral argument heard. Case argued by Jerry V Beard for Appellant Humberto Fidel Regalado Cuellar, Denise B Williams for Appellee USA [05-10065] (pft)
2/22/06	Opinion filed. Issd in T form? Y Mandate pull date is 3/15/06. [05-10065] (rmf)
2/22/06	Judgment entered and filed. [05-10065] (rmf)

6/30/06	COURT Order filed granting petition for rehearing en banc [5400581-1] with Argument (Y/N)? y Before: All Active Judges A/Pet Supplemental Brief due on 7/31/06 for Humberto Fidel Regalado Cuellar. E/Res Supplemental Brief due on 8/30/06 for USA. Counsel notified via e-mail. [05-10065] (gam)
6/30/06	Case reopened. [05-10065] (gam)
9/27/06	Oral argument heard En Banc. Case argued by Nancy E Larson for Appellee USA, Jerry V Beard for Appellant Humberto Fidel Regalado Cuellar . [05-10065] (sme)
2/2/07	Opinion filed. Issd in T form? y Mandate pull date is 2/23/07. [05-10065] (jma)
2/2/07	Judgment entered and filed. [05-10065] (jma)
5/16/07	Supreme Court notice that petition for certiorari was filed on 05/03/07 by Appellant Humberto Fidel Regalado Cuellar. Supct No.: 06-1456 [05-10065] (cav)
10/29/07	Supreme Court order received granting petition certiorari [5752604-1] by Appellant Humberto Fidel Regalado Cuellar on 10/15/07. [05-10065] (cav)

10/29/07	Record on appeal requested from the district court for the Supreme Court. [05-10065] (jtr)
10/29/07	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Vols: 1 [05-10065] (gmr)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No.
	§	6-0CR 055 C
HUMBERTO FIDEL	§	
REGALADO CUELLAR	§	

INDICTMENT

The Grand Jury Charges:

Count One
Laundering of Monetary Instruments
(Violation of 18 U.S.C. § 1956(a)(2)(B)(i))

Beginning on or about June 28, 2004, and continuing to on or about July 14, 2004, in the San Angelo Division of the Northern District of Texas and elsewhere, **Humberto Fidel Regalado Cuellar**, defendant, did knowingly and willfully transport and attempt to transport funds, that is, approximately $83,235 in United States currency, through the Northern District of Texas, in the United States, to a place outside the United States, that is, Acuña, Coahuila, Mexico, knowing that the funds involved in the transportation represented the proceeds of some form of unlawful activity and knowing that such transportation was designed in whole or in part to

conceal and disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, to wit: the trafficking of controlled substances in violation of Title 21, United States Code, Sections 846 and 841(a)(1).

In violation of Title 18, United States Code, Sections 1956(a)(2)(B)(i) and 2.

A TRUE BILL:

s/ [illegible]
FOREMAN

RICHARD B. ROPER
UNITED STATES ATTORNEY

s/ Amanda Burch
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

THE UNITED STATES OF AMERICA

v.

HUMBERTO FIDEL REGALADO CUELLAR

INDICTMENT

18 U.S.C. § 1956(a)(2)(B)(i)
18 U.S.C. § 2
LAUNDERING OF MONETARY INSTRUMENTS
AIDING AND ABETTING

(ONE COUNT)

A TRUE BILL s/ [illegible]

Lubbock Foreman

Filed in open court this 8th day of August, 2004

Clerk

DEFENDANT IN FEDERAL CUSTODY

s/ Nancy M. Koenig
UNITED STATES MAGISTRATE
~~DISTRICT~~ JUDGE

APPENDIX C

EXCERPTS FROM TRIAL TRANSCRIPT PART 1 OF 2

Direct Examination by Ms. Williams

Witness: Kevin Herbert

[54]

Q. **[MS. WILLIAMS]** Now, 277, where does it–from Eldorado, if you go south, where do you go?

A. **[KEVIN HERBERT]** You go down toward Del Rio and into Mexico.

Q. It goes all the way to the Texas/Mexico border?

A. Yes, ma'am, it does.

Q. Okay. To Del Rio. And what is the city just on the other side of the river in Mexico?

A. Acuna, Mexico.

* * *

[55]

Q. Okay. All right. I want to recall your attention back to 7 July 14th of this year and ask if you became involved in an investigation concerning Mr. Cuellar, the defendant.

A. Yes, I did.

Q. And is this Mr. Cuellar, the person that you came in contact with that evening?

A. Yes, ma'am, it is.

Q. About what time of the day or night did you first come into contact with him?

A. It was evening time, a little after 8:00. It was the summer, so it was just before sunset.

Q. What were the circumstances around you and he coming into contact?

A. At that time–I think it was about 8:20 in the evening–I was on traffic road patrol traveling northbound on Highway 277 south of Eldorado. I did observe a white VW bug traveling southbound approaching me. The vehicle appeared to be going very slow. I did–I did clock the vehicle, and it was doing 40 miles per hour in a 70 zone. As I was doing this, I observed that the vehicle

[56]

drove off onto the–off the roadway, onto the shoulder. Looking around, he was the only vehicle on the road, and I didn't see no reason for him to do that. At this time, I figured he–I had a feeling he might–or a suspicion he may have been intoxicated. I passed the vehicle and I turned around, checked–further checked the vehicle, and he did come back onto the roadway. After I got behind the vehicle, I also noticed the vehicle was not displaying a registration or a license plate for that vehicle.

Q. So you had been going–you were south of Eldorado, but you had been going north on 277?

A. Yes, ma'am.

Q. And is that two lanes going north and two lanes going south?

A. It's one lane going north and one lane going south.

Q. Okay. It's just one lane in that area?

A. Yes, ma'am.

Q. So you're going north, and you see a car, this small Volkswagen, coming toward you?

A. Correct.

Q. Appeared to be going slowly?

A. Yes, ma'am.

Q. Now, were you able to clock him as he was coming toward you?

[57]

A. Yes, ma'am. I clocked him doing 40 miles per hour in a 70 zone.

Q. You see him go off the roadway, and then you turned around and got in behind him?

A. Yes, ma'am.

Q. Did you stop Mr. Cuellar's car?

A. Yes, I did.

Q. Where did you stop him?

A. It was approximately 2 miles south of Eldorado in front of the Niblett's Oil Field Services Company, which is south of Eldorado, just in front of that.

* * *

[58]

Q. Does Mr. Cuellar speak English, or did he speak English with you?

A. No, he didn't.

Q. Do you speak Spanish?

A. No, I don't.

Q. Any conversations that are picked up on the video with Mr. Cuellar, are they in Spanish?

A. Yes, Spanish and English.

Q. He's speaking in Spanish, but eventually did you have someone to help you in interpreting?

A. Yes, ma'am, I did.

* * *

[59]

Q. When you first stopped Mr. Cuellar and you approached his car, what did–did you tell him who you were?

A. Yes, ma'am. I identified myself and I asked him for his driver's license and insurance. Because of the language problem–he indicated he did not speak any English, so the best Spanish I could do, which is little to none, I asked him for his driver's license, and he gave it–gave me a Mexico driver's license.

Q. When you first walked up to his car and asked him for his driver's license and insurance, did you know then that he couldn't–or he wasn't speaking English?

A. Yes, after I started talking to him.

Q. After you asked him for that, you realized that–

A. Correct.

Q. –you needed a Spanish speaker out there?

A. Yes, ma'am, I did.

Q. Were you able to– Besides the Mexican driver's license, was he able to provide insurance to you?

A. No, ma'am.

[60]

Q. When you realized that you wouldn't be able to talk to Mr. Cuellar, what did you do?

A. I called my dispatcher on the radio and had them to summon DPS Trooper Danny Nunez, because I knew he was working at the time and I knew he would be able to interpret for me.

Q. He's a Texas Department of Public Safety trooper there in Schleicher County?

A. Yes, ma'am.

Q. And does DPS have their office actually in the Schleicher County Sheriff's Office?

A. Yes, they do.

Q. Did Trooper Nunez come there to the scene?

A. Yes, he did.

* * *

[61]

Q. What was your understanding of what Mr. Cuellar was saying?

A. From what information I could gather from Trooper Nunez, Mr. Cuellar did not have any insurance on the vehicle. He asked him where he was going, and he said he was going to Acuna, Mexico. He said he had been in San Angelo attempting to buy another vehicle. According to Trooper Nunez, he had been in the Texaco–I'm sorry, Texas for three days. He was on his way back because he couldn't find a car that he liked.

Q. Now, some of the information that Trooper Nunez gave you that he was getting from Mr. Cuellar, did you use some of that information in order to determine what you should do next there at the scene?

A. Yes. Trooper Nunez asked him if he was carrying any money, and Mr. Cuellar did produce a large sum of money, rolled up, out of his left pocket. He also told Trooper Nunez he didn't know how much money exactly he had. When Trooper Nunez asked him for consent to search the vehicle, he gave consent to search the vehicle. Trooper Nunez found a

[62]

Whataburger bag in the passenger compartment of the vehicle, and the bag on it had a receipt with a phone number on it.

* * *

[63]

Q. Do you see Government's Exhibit 4?

A. Yes.

Q. What is that?

A. It is a fast-food receipt for–a Whataburger drive-through receipt.

Q. This receipt was found inside of the Whataburger sack in Mr. Cuellar's car?

A. That's correct.

Q. Is there a phone number on the Whataburger receipt? Let me direct your attention to the bottom left–

A. Okay.

Q. –of that receipt.

A. Okay. Yes, ma'am.

Q. Okay. What is that phone number?

A. It's kind of hard to read. It's faded out a little bit.

Q. Does it start with 432?

A. 432, yes, ma'am.

Q. And do you know that to be an area code–

A. Yes, ma'am, I do.

Q. –for somewhere out in West Texas–

A. Yes, ma'am.

[64]

Q. –since they all changed from 915?

A. Yes, ma'am.

Q. At the time, did you–were you familiar with that 432 area code?

A. Yes, ma'am, I was.

Q. What is the area code in Eldorado?

A. It is 325.

Q. It's 325. What's the area code in San Angelo?

A. 325.

Q. And where do you know the 432 area code to be?

A. I have a friend of mine who works for the sheriff's office in Big Spring, which is Howard County, and his area code number out there is 432.

* * *

[65]

Q. And he didn't say anything about coming from Big Spring?

A. No, ma'am, he didn't.

Q. Was it a huge factor to you or was that one of those things that you just took note of?

A. I believed it was–he was trying to conceal something; he just–he left that out, and I believed that why he would want to go to Big Spring and not mention that instead of San Angelo was kind of out of the ordinary.

* * *

[66]

Q. On the Whataburger receipt, does it give a date and a time?

A. Yes. The date on there is July 14th, and the time on the receipt is 5:55 p.m.

Q. The date was the same date that you stopped him in Eldorado?

A. Correct.

Q. And if he had gone through the drive-through in Big Spring at 5:55 p.m., would–timewise, would that have been consistent with the time then he was in Eldorado?

A. Yes, ma'am, it would.

Q. What else did you find that was significant to you in Mr.–at that time in Mr. Cuellar's car?

A. He had given me some paperwork to the vehicle when I was trying to ascertain the insurance. He just gave it to me. Because of the language prob-

lem, we had a little problem understanding each other. And I did find some bus tickets.

Q. Now, the paperwork he gave you from the car, was that in an envelope that he got from the car?

A. Yes, ma'am.

Q. Where in the car did he get that?

A. The glove box.

Q. Now, when you had first started talking to him and he–did he get out of the car?

[67]

A. Yes, ma'am, he did.

Q. And did he go to anywhere around the car and do anything after he got out?

A. Yes, ma'am. He walked to the front of the vehicle while I was trying to ask him for his insurance the best way I could. On his own accord, he opened up the front hood area, which, on a VW, is the front–the hood is in the front of the vehicle instead of the back, and he just opened up the hood latch.

* * *

Q. Now, was this before Trooper Nunez got there?

A. Yes, it was.

Q. What did you see–we're going to–I don't know what you call that thing if it's in the front of the car. I'm just going to call it the trunk. What was in the trunk when he opened it?

A. There was the gas tank, spare tire, and nothing else.

Q. Did you ask him about–or when Trooper Nunez got there,

[68]

what was your understanding about what Mr. Cuellar was saying about his travels?

A. My understanding was he had been in Texas for three days, and like I say, he hadn't found a car and was on his way back home. We both thought this was not consistent with his story, because he did not have any clothing or any luggage in the vehicle.

* * *

Q. Now, as you searched further in the car, you found–I think you said you found some bus tickets.

A. Yes.

Q. And are those represented in Government's Exhibits 8 and 9?

A. Yes, they are.

Q. Now, on Government's Exhibit 8, does it have the name on there, the name of someone?

A. Yes. It has the name of the defendant.

Q. It has Humberto Cuellar on there?

A. Yes, it does.

Q. Now, this bus ticket, what is the date of issue?

[69]

A. Looks like the 13th of July of this year.

Q. July 13th. That would be the day before you stopped him in Eldorado?

A. Yes, ma'am, it is.

Q. And this ticket is for transportation on what bus company?

A. Kerrville Bus Company.

Q. From where to where?

A. From Del Rio, Texas, to Uvalde, Texas.

Q. And from Uvalde, where?

A. From Uvalde to San Antonio, Texas.

MS. WILLIAMS: If I may approach the map, Your Honor.

Q. (BY MS. WILLIAMS) So he had this bus ticket in his possession, and it was for–from Del Rio, which would be just– which would be south of Eldorado?

A. Correct.

Q. From Del Rio to Uvalde, which is between Del Rio and San Antonio?

A. Correct.

Q. And then from Uvalde to San Antonio?

A. Yes, ma'am.

Q. Okay. So going due east from Del Rio–

A. That's correct.

Q. –to San Antonio? Now, the bus ticket that he had in his possession in Government's Exhibit 9, what is the date–the departure date on

[70]

that?

A. The depart date on that says Tuesday, 13 July 2004.

Q. Okay. Departing from where?

A. San Antonio, Texas.

Q. At 7:05 that evening?

A. Yes, ma'am.

Q. All right. Going where?

A. To Big Spring, Texas.

Q. To arrive at what date at what time?

A. 14th of July at 1:20 in the morning.

Q. Okay. And then on to where?

A. On to Lubbock, Texas.

Q. And then where?

A. Tulia, Texas.

Q. And then where?

A. And to Amarillo, Texas.

* * *

[71]

Q. What time was it he was scheduled to arrive in Amarillo on the 14th?

A. 7:00 in the morning.

* * *

Q. Okay. After you found the bus tickets in his car and the other documentation that he gave you, what happened out there at the scene?

A. Trooper Nunez talked to him in Spanish, and he gave Trooper Nunez consent to search the vehi-

cle. We went up to the front area of the vehicle where he had raised up the hood, and looking at the gas tank, there was–the mounts that held the gas tank in place, they looked like they had been tampered with. What I mean by that, the paint had been scratched off on

[72]

the mounts and the screws themselves. And we also found two bolts laying on the–loosely on top of the gas tank.

Q. What about that was significant to you?

A. That indicated to me that–that's a consistent way of–you can hide narcotics or illegal contraband in the vehicle.

* * *

Q. At this point, during the conversation that Trooper Nunez was having with the defendant, were you catching a lot of what was being said?

A. Bits and pieces of it.

Q. Okay. All right. So he hands the money to Trooper Nunez?

A. Yes, and then Trooper Nunez takes it and starts sniffing on the money, and then he hands it to me and tells me to take a

[73]

sniff of it, and I did so.

Q. When you smelled the money, what did it smell like to you?

A. It smelled like marijuana, not burnt, but like it had been packaged with marijuana, like an old

scent type, not like you had smoked it, but like in a package.

Q. Not smoked marijuana, but raw marijuana?

A. Yes, yes.

* * *

Q. After you smelled it on the money, then what did you do?

A. Suspecting there might be some contraband in the vehicle, I did have my dispatcher summon Deputy Chatham and his K-9 dog to the scene.

Q. And the deputy came with the dog?

[74]

A. Yes.

* * *

Q. And did Deputy Chatham run his dog on the car?

A. Yes, he did.

Q. Okay. After he ran the dog on the car, what did you do next?

A. While he was doing that, I summoned a border patrol agent to the scene to check his immigration status, and he–Agent Coronado was nearby. He showed up, and we had him check his immigration status, along with his border crossing record.

Q. Did it appear at that point that he was allowed to be in the United States on a border crossing card?

A. Yes, it did.

* * *

[76]

Q. How much money was he carrying in his pockets, including his wallet?

A. Two thousand dollars and two hundred and seventy-five–$2,275.

Q. And you counted that there in front of him?

A. Yes, ma'am, I did.

Q. After you counted the money and after the deputy got through in the car, how did you get Mr. Cuellar's car back to the Schleicher County Sheriff's Office?

A. While Deputy Chatham was further inspecting the vehicle, he found a hidden man-made compartment in the back of–behind the rear seat of the vehicle which had been covered up with–a plate had been taken out of it. The floorboard had been cut out and screwed back down with sheet-metal screws, and part of it was still sticking up. He was able to look in there and he saw these bundles of duct tape.

Q. And eventually did you see that also?

A. Yes, I did.

Q. Then at some point, you got the car–Deputy Chatham drove the car back to Schleicher County?

[77]

A. Yes, ma'am, he did.

Q. And had you placed Mr. Cuellar under arrest at that point?

A. Yes, ma'am, I did.

Q. Did you drive Mr. Cuellar back to Schleicher County

Sheriff's office?

A. Yes, ma'am, I did.

Q. And did Trooper Nunez go back to the Schleicher County Sheriff's Office?

A. Yes, he did.

* * *

[78]

Q. Now, the hidden compartment you're referring to, where in the car was it?

A. It was in the rear of the vehicle behind the passenger's seat. The passenger's seat on the VW are one big seat, and it

[79]

was directly behind that, and there was carpeting on top of–

Q. It had carpet on top of–

A. Yes, ma'am.

Q. –a piece of sheet metal that had been screwed down?

A. Correct.

Q. Was there anything on top of the carpet?

A. There was two car speakers in wooden boxes.

Q. So underneath the speakers, underneath the carpet, underneath this piece of sheet metal was these bundles?

A. Yes, ma'am, it was.

* * *

Q. And the next picture shows what?

A. It shows the glove box of the vehicle. We found a screwdriver and a Sharpie pen.

Q. And a Sharpie, is that like a marker?

A. Yes, ma'am.

Q. Now, what was significant about that screwdriver and the

[80]

Sharpie?

A. Well, I believed these items were consistent with what we found on the packaging. On the packaging themselves, when you took them out, it had numbers written on the duct tape, and–like dollar amounts. And the screwdriver was a Phillips-type screwdriver, which would match the type of sheet-metal screws that were on top of the cover on the hidden compartment.

* * *

Q. Tell us how else the packages were wrapped and what was in them.

A. There were blue Wal-Mart bags. They covered up blue Wal-Mart bags. Inside the blue Wal-Mart bags were large sums of U.S. currency.

Q. Was there something in writing on the outside of the packages on the duct tape?

A. Yes, ma'am. There were numbers.

Q. Numbers written?

A. Yes, ma'am.

Q. Ultimately did you discover that the numbers corresponded to something else related to the packages?

A. Yes, ma'am.

Q. What was that?

A. The dollar amount of what was in the–the money–the

[81]

amount of money that was in each package.

Q. Now, the numbers that were written on the outside of the package, did they appear to be written in marker?

A. Yes, ma'am, they did.

Q. Does the Sharpie pen–will it write on duct tape?

A. Yes, it will.

Q. And the numbers that were written on the outside of the packages corresponded with the amount of money contained within the packages?

A. Yes, it did.

* * *

Q. If you would, hold that up and show the

[82]

jury what that is.

A. These are the packages of duct tape, and this is the blue Wal-Mart bags that were wrapped inside the duct tape, and inside of that was what contained the currency, and this is what was in the back of the hidden compartment of the vehicle.

Q. After you got all the money out of the packages, what did you do with it?

A. I placed the packaging itself into our evidence vault, and myself and Sheriff David Dorne, we took the money over to the bank in Eldorado and had them count it for us.

Q. Counted the money, and then what did you do?

A. Brought it back to the office and placed it in the evidence vault also.

Q. At some point, did you deposit the money into a bank account so you weren't hanging onto all that money?

A. Yes, ma'am. The next morning, myself and the jail administrator went over to the bank and deposited the money.

Q. Including the amount that the defendant had on his person, how much did you deposit into the bank the next day?

A. $83,235.

* * *

Cross-Examination by Mr. Sloan

Witness: Kevin Herbert

[85]

Q. **[MR. SLOAN]** You found a Magic Marker in the glove box. Correct?

A. **[KEVIN HERBERT]** A Sharpie marker.

Q. Okay. Sharpie marker. Did you–when you sent the packaging to the lab, did you send the marker along also to see if it was the same marker?

A. No, I didn't.

Q. Did you check the marker for fingerprints?

A. No, I didn't.

Q. You did have the packaging checked for fingerprints. Correct?

A. Yes. Correct.

Q. You had Mr. Cuellar Regalado–you had his fingerprints. Correct?

A. Correct.

Q. And you were unable to find any fingerprints of his on the packaging, on the marker, or the screwdriver in this case. Correct?

A. Correct.

* * *

[86]

Q. You never sent any of the money to the lab, did you?

A. No, sir, I didn't.

Q. When you counted the money, you arrayed it, I believe in your office, on a table for photographing. Correct?

A. Correct.

Q. And you put the money on the same table as the money you had taken from Mr. Cuellar's pockets. Correct?

A. Correct.

Q. And then you put all the money in the evidence vault and then to the bank. Correct?

A. Correct.

Q. This was a substantial amount of money. Is that fair to say?

A. Yes, sir, it was.

Q. Including at least $1600 that you and the trooper indicated smelled like marijuana. Correct?

A. Correct.

Q. You waited until the bank opened; then you put it in the bank and you got a receipt. Correct?

A. That's correct.

Q. So that money is back in circulation. Correct?

A. Correct.

Q. Did you direct the bank to disinfect or remove the smell from that money in any way?

[87]

A. No, I didn't.

* * *

[91]

Q. In fact, in addition to the bus tickets, you also found some other type of paperwork in the car. Correct?

A. Correct.

Q. Among those items of paperwork was a–were three Spanish permits to operate without plates. Correct?

A. I believe so.

Q. And one was in his name dated June 28th, 2004. Correct?

A. Correct.

Q. Another one in his name was dated April 17th of 2004?

A. Correct.

Q. And there was another one in the name of David Rodriguez Aleman dated May 18th of 2004, wasn't there?

A. Correct.

Q. Okay. So he indicated to you later on in conversations that other people had been using his car. Correct?

A. Earlier. Correct.

Q. All right. And the paperwork supported that?

A. Correct.

* * *

Redirect Examination by: Ms. Williams

Witness: Kevin Herbert

[96]

Q. **[MS. WILLIAMS]** You did send the packages, as well as some other things, to the lab to see if they could get fingerprints off of them?

A. **[KEVIN HERBERT]** Correct.

Q. And specifically Mr. Cuellar's fingerprints?

A. Correct.

Q. Were they able to do that?

A. No.

Q. In your experience as a law enforcement officer, does that–is that significant to you?

A. No, it's not.

Q. Why is it not?

A. A lot of them, if they're experienced enough, they will handle it with gloves and keep their fingerprints off of it, because you can–it's a known fact that you can get fingerprints off of duct tape and many other types of–even paper.

Q. Or maybe he wasn't the one that put them in the car?

[97]

A. Correct

* * *

Direct Examination by: Ms. Burch

Witness: Danny Nunez

[100]

Q. [BY MS. BURCH] How did you become involved in the encounter with the defendant?

[101]

A. [DANNY NUNEZ] Well, I was working regular patrol out on the highways, and I was called to assist Officer Herbert on a traffic stop. He was needing some translation. I'm fluent in Spanish, and I went and translated for him.

Q. At the time that you arrived, was–Deputy Herbert was where? Tell us what happened when you arrived.

A. When I arrived at the scene, I observed that he was driving a white Volkswagen. The hood, which is located in the front–or, excuse me, the trunk, which is located in the front, was open. Mr. Regalado was standing beside his Volkswagen with Officer Herbert in the rear of the Volkswagen.

* * *

Q. So did you, at that point, go and talk to the defendant?

A. Yes, ma'am, I did.

Q. What happened?

A. I went and I asked Officer Herbert what he needed, and he was looking for an insurance on the vehicle Mr. Regalado was driving. I asked Mr. Regalado if he had his insurance for his vehicle, and he told me he didn't have his insurance with him.

* * *

[102]

Q. Okay. At that point, did you ask any other questions of the defendant?

A. I noticed that he was real nervous, and I just asked him where he was coming from, and he stated Acuna, Mexico.

Q. And why were you asking him where he was coming from?

A. He seemed to be nervous. He wouldn't look me straight in the eyes or look at me at all when I was talking to him. That's one of the things that I've learned through my training and experience. A lot of times when you're talking to somebody

out on a traffic stop or a traffic accident and–anytime you're talking to them and you look away or look down, it shows that

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they're either trying to hide something or being deceptive of the truth.

Q. So you started to talk to him. You asked him where he was coming, where he was going. What else did you ask him and what did he tell you?

A. Well, I asked him where he was coming from; he said Acuna. I knew this couldn't have been true, because he was headed the wrong way if he was coming from Acuna. I asked him again, "Where are you coming from," and he said San Angelo. I said, "Oh, what were you doing in San Angelo?" He said he went to go buy a truck. And while I was talking to him, I noticed that he had a large bulge in his front pocket, and–which made me think–I was not sure what it was. I had no–no idea what it could be.

Q. Did you ask him what it was?

A. Yes, ma'am, I sure did.

Q. And what did he tell you?

A. He told me it was money.

Q. Did you ask to see it?

A. Yes, ma'am, I did.

Q. And was he willing to show it to you?

A. Yes, ma'am, he was. Prior to me asking him if I could see it, I asked him how much money he had, and he said 600. And I asked again, "How

much?" And he said 1,600. I said, "Do you mind if I look at it?" He said, "No, I sure don't," and he

[104]

pulled it out.

Q. Was there anything about that that you took note of that may have stood out in your mind?

A. Yes, ma'am. When he pulled his currency from his front pocket, I detected the odor of marijuana. At no other time did 6 I smell marijuana until the money came out of his pocket. I noticed that it was–it appeared to be more than 1,600 that he had in his pocket.

* * *

Q. Was there ever a point during this conversation that you were having with the defendant that you became suspicious?

A. Yes, ma'am, there was.

Q. Can you tell us about that?

A. Yes, ma'am. The inconsistencies of his story, where he was coming from, the money, the odor of narcotics coming from the currency that he pulled out of his pocket. I found that there possibly could be something else that this traffic stop was fixing to lead into.

[105]

Q. Okay. So at the point that you became suspicious, what did you decide to do to address those suspicions?

A. Well, I asked Officer Herbert if he had asked for consent to look inside the vehicle since the trunk

was open, and Officer Herbert said, "No, I hadn't asked, but if you will ask him, that will be fine." I said, "Well, how is the trunk open?" He said, "He opened the trunk on his own."

Q. Did you think there was anything unusual about the–that he went and opened the trunk on his own without being asked?

A. Yes, ma'am. Through my training and experience, a lot of times when there is something illegal or criminal activity occurring inside the vehicle, a lot of times the person driving the vehicle will deter you to the front or to the side of the vehicle. And it's always been my experience to go to the opposite end of the vehicle, and usually that's where criminal activity has occurred.

Q. So at that point, did you ask the defendant for consent to search his car?

A. Yes, ma'am, I did.

Q. And did he give you that consent?

A. Yes, he sure did.

Q. And did you then search the car?

A. Yes, ma'am. I did a preliminary check of the vehicle. I looked inside the vehicle through the windows, went to the front of the vehicle. I noticed that the gas tank on these

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VWs– Well, let me explain about the VWs. In Mexico, they are currently still made. They are not like the VWs that they make here. It's the old beetle wagon where the engine is in the back; the trunk is in the front. This vehicle was a '94

model, and currently, today, they still make these vehicles there in Mexico. I noticed that the front, where the gas tank is on the vehicle, it had two clamps holding down the gas tank. One of them was backwards. There was also fresh tool marks on both clamps. I also saw there was drill marks on the fender walls of the vehicle.

Q. And when you took note of those things, what about that is important to us here? Why do we care about the clamps and the tool marks?

A. Well, there was also some mud splashed throughout the vehicle that was inconsistent of somebody going through a mud puddle. And I've been able to apprehend other loads by taking note of this, which showed the mud–there was no way there was mud in certain areas without somebody putting it or splashing it on their–on their own. It appeared that they had used some type of an acoustic gun which you use to shoot acoustic to shoot mud. It even had the little specks, and they were perfectly formed, as you would see in a ceiling that had just been sprayed.

Q. So, Trooper Nunez, you believe that the mud on the car was

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put there on purpose?

A. Yes, ma'am.

* * *

Q. And in your experience just being out on the road, what have you seen before with that same kind of thing?

A. A lot of times we'll have a vehicle that will come in and–or a vehicle that we stop out on a traffic stop and you will see mud splashed underneath or you will see oil, fresh oil with dirt thrown on it where the dirt sticks to the oil. And what this is used for a lot of times is that anytime we go underneath a vehicle to check the vehicle out, they will have this, and it's a cover-up, what I call a cover-up to cover up tool marks, fresh paint, just any work that they have done underneath the vehicle.

Q. I want to make sure–let's go back to the part about the gas tank and the screws. I want to make sure that the jury understands why you took note of a screw being on backwards and what you were talking about the gas tank. Can you explain that

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to the jury?

A. Yes, ma'am. We've–through training and experience and schools that we've been through, there's been a lot of loads being carried inside gas tanks. Also, on the VW, there's a natural void underneath the gas tank. The natural void probably is about 12 to 18 inches, and there's nothing there. We have also came across compartments where you can go in through the fender wall of the front of the vehicle as you take

the wheels off. You can take that fender wall off, and there's usually–sometimes, not all the times, but there's contraband that's been hidden in there.

Q. As you searched the car, you have already testified that you noticed the gas tank, you noticed the mud. Was there anything else that you noticed when you were looking at the car that you found unusual or odd or suspicious?

A. Yes, ma'am. The interior of the vehicle was sun-faded. If you've seen a truck or you have a vehicle yourself that's been parked out in the sun and you don't put Armor All or something to protect the vinyl in it, the sun beats it down, turns it white. Even seats start to tear with the sun. I noticed that the seats weren't in very good shape, but the carpet in the vehicle appeared to be newer than the rest of the interior of the vehicle.

Q. And is that unusual, when you're looking at a vehicle, for the seats to look like they're older but the carpet to look

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like it's newer?

A. No, not really, ma'am. But the carpet appeared to be newer, and sometimes, you know, you might replace your carpet because it wore out before your seats wore out. But as I looked to the rear of the vehicle, I noticed that there was some type of animal hair concentrated in one area, but there was no other area in the vehicle that had animal hair.

Q. Did you ask the defendant about the animal hair?

A. Yes, ma'am, I did.

Q. And what did he tell you?

A. He told me that prior to this date, he had gone to San Angelo and had purchased some goats and drove them back to Mexico.

Q. Did you find anything about that unusual?

A. I'm not sure how the goats would really fit back there. I guess they could fit. But if you're putting a dog or a cat or a goat inside a vehicle, you know, they will leave a trail of hair or some type of residue from their body throughout the vehicle. There was only this area. This was the only area that had animal hair.

Q. And where in the car was that area that you're talking about?

A. It was behind the back seat, in between the back window or the engine and the back seat.

Q. Okay. Was there anything else as you were looking at the

[110]

car? You have talked about the carpet, the tank, the animal hair. Anything else?

A. Yes, ma'am. I saw that he didn't have any hygiene with him, any clothes. There was some fast food–there was a fast-food restaurant bag that had an area code of 432, which I knew was not in the San Angelo area.

Q. And why did you find that, I guess–you said you found that odd. Why?

A. Well, first of all, he told me he was coming from San Angelo, and I knew that that Whataburger bag had a 432 area code on the receipt, and I knew that he must have had gone further down–I

guess you would say west, at least up to the Midland/Odessa area, because of the 432 area code.

Q. Okay. And you said you also found it odd that there were no–I think you said the word hygiene items.

A. Yes, ma'am.

Q. He didn't have any bags with him?

A. No, not at all. Other than that Whataburger bag, that's all he had with him.

Q. And why did you think that was odd?

A. Well, he told me he had been on a road trip for three days, and I couldn't–I just didn't understand why you wouldn't have any hygiene or any clothes to change for a three-day trip.

Q. Okay. Is it possible that he just might not have brought a bag with some clothes with him?

[111]

A. Yes, ma'am, it's possible.

Q. But you find that unusual?

A. Yes, ma'am. That's also one of the signs that we use during the interdiction, or anytime that we are interviewing a person on a traffic stop.

Q. Did there come a time during the course of the stop, after you had done this sort of initial look-through and you made note of all of these things that you've told the jury about, that you decided to investigate further?

A. Yes, ma'am, there was a time, and I asked Deputy Herbert if he could contact a K-9 unit and do a search on the vehicle with a K-9 unit.

Q. Now, did you make that call or did someone else make that call?

A. Deputy Herbert made that call, ma'am.

Q. Okay. And did, at some point, someone come with a K-9, with a dog?

A. Yes, ma'am.

Q. Okay. And did you ask the defendant if he would allow you to search the car using the dog?

A. Yes, ma'am, I did. I asked him in Spanish if he would allow us to use a K-9 to search his vehicle.

Q. And did he allow that?

A. Yes, ma'am, he did.

* * *

[114]

A. Well, we–myself and Officer Herbert started counting the money in front of Mr. Regalado. I asked him if he would cooperate–

Q. And are you–I'm sorry. Are you referring to the money that was in his pocket?

A. Yes, ma'am. I'm sorry.

Q. That's all right.

A. The money that he had in his right front pocket, I believe it was. We started counting the money in front of him, and I asked Mr. Regalado if he would cooperate with us, and it would be a whole lot safer if we were able to take the vehicle to the sheriff's office and off the roadway, not only for the officers' safety, but also for his safety, and do a closer inspection of the vehicle.

Q. And did Mr. Regalado Cuellar agree to that at that point?

A. Yes, ma'am, he did. He said he would be more than happy to.

Q. And is that what happened?

A. Well, as we were counting the money, there were several twenties and tens, and as we were counting, it took quite a–well, I'd say a little bit of time; I'm not sure how long. Officer Chatham was checking where his dog had indicated inside the vehicle. As we had completed counting the money, Officer

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Chatham came out of the vehicle and said, "Hey, hook him up, hook him up," which means take custody or place him under handcuffs. And as we did that, he said that he had found a compartment in the back with some type of bundles.

Q. Okay. So Officer Chatham told you, as you were counting the money, to arrest the defendant because he had found the compartment with the bundles.

A. Yes, ma'am.

Q. Is that right?

A. That's correct, ma'am.

Q. Okay. So at this point, did you arrest the defendant?

A. At this point, ma'am, what we did is we handcuffed him and placed him into Officer Herbert's vehicle, I believe it was.

* * *

[116]

Q. Are you aware about what was found inside that secret compartment?

A. Yes, ma'am, I am.

Q. And what was that?

A. It was a large amount of U.S. currency.

Q. I think you have got right in front of you a package. That's it. Yes, pull that up.

A. Yes.

Q. And what's the government exhibit number on that?

A. This is Exhibit Number 5, ma'am.

Q. Exhibit Number 5. Is that what you found inside the compartment?

A. Yes, ma'am, it is.

Q. Okay. And what was inside that?

A. It had this gray tape with these Wal-Mart bags, and inside the Wal-Mart bags had a large amount of currency. Each one contained different amounts. It was written there on the gray tape how much it was on each one.

Q. Is there anything about the way that was wrapped like that that seemed suspicious to you in your experience?

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A. Yes, ma'am. I saw that it had black markings or been written on with a black marker. And inside the glove box was a black marker.

* * *

[118]

Q. Trooper Nunez, what about that screwdriver in the glove box made you want to pick it up and mark it into evidence?

A. Ma'am, the compartment that was made on the vehicle had six screws, and it took the same tool that was in his glove box to remove the top to that compartment.

Q. Okay. So the screws that were on the top of that compartment were not a different type of screwdriver or a different size? They matched that one?

A. Yes, ma'am. They matched it just right.

* * *

[119]

Q. Thank you. Also in front of you there is something marked Government Exhibit Number 10. It's already been admitted into evidence. Do you see that? It's a plastic–

A. Yes, ma'am, I do.

Q. Okay. Is that written in English or Spanish?

A. This is in Spanish.

Q. And can you tell what that is?

A. It appears to be a traffic ticket.

Q. Can you look at the date on that traffic ticket? Can you find the date on there?

A. Yes, ma'am.

Q. And what is the date on that?

A. The date is May the 3rd, 2004.

Q. Okay. And in Mexico–check where it says under the line, because the numbers–

[120]

A. Okay. I'm sorry. They are backwards. Sorry. It was March the 5th, 2004.

Q. In Mexico, do they list the day and then the month?

A. Yes, ma'am. I'm sorry.

Q. So when you read it– So the actual date is March the 5th; is that correct?

A. That's correct, ma'am.

Q. Who is that ticket issued to?

A. Mr. Regalado Cuellar.

* * *

[121]

Q. Did he ask to use the rest room?

A. No–

Q. Did you allow it?

A. No, ma'am, he didn't ask to use the rest room. The only thing he asked to do was to use the telephone.

Q. And did you allow him to use the telephone?

A. No, ma'am. I told him that it would be a little bit, because the–it was still under investigation and that I would allow him to use the telephone once we completed our investigation.

[122]

Q. Did you in any way threaten him, hurt him, anything like that to make him talk to you?

A. No, ma'am, I did not. The only thing he was really worried about at that time that we were talking was to use the telephone, and he told me that if he didn't use the telephone and call his family in Mexico by midnight and the vehicle wasn't in Mexico by midnight, that his family would be floating down the river.

Q. Why didn't you allow him to use the telephone?

A. Because we were just initiating our–or in the middle of our investigation.

* * *

Cross Examination by Mr. Sloan

Witness: Danny Nunez

[130]

Q. **[BY MR. SLOAN]** All right. I would direct your attention to page–the

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bottom of page 5. The question you asked him was in Spanish. The English translation is, "What do you have in your pockets?" Right?

A. **[BY DANNY NUNEZ]** Yes, sir.

Q. And he says–the Spanish–again, the translation, "I have money and an ID." You asked him, "Let me see the ID." He responded, "Okay." You asked him, "What do you have in the other pocket?" And he said, "It's $1600." The first time you asked him about the amount of money he had, he said $1600. Correct?

A. No, sir. He said $600.

Q. All right. So you disagree with the interpretation here? You think it was $600?

A. The first time, yes, sir.

Q. And to say in Spanish $1600, you would say (speaking in Spanish). Correct?

A. That's correct, sir.

Q. All right. So if, on the video, the first time you asked him how much money he had, he says (speaking in Spanish), he's saying $1600. Correct?

A. That's correct, sir.

* * *

[132]

Q. Had you taken the money out of his wallet and the money out of his pocket and combined them before you counted them?

A. No, sir. He had handed it to me, the roll of money, not the money from his wallet, I believe.

Q. All right. But when you counted the money, you counted all the money. Right?

A. Yes, sir.

Q. So in terms of how much was in the roll and how much was in his wallet, you can't say with certainty how much was in each, can you?

A. No, sir, I probably couldn't.

Q. Okay. So if he told you he had $1600 when he handed that to you, you would have no way to say that that's not correct?

A. No, sir, I sure wouldn't.

* * *

[135]

Q. When you took the screwdriver and the Sharpie marker out of the glove box, did you do that with your bare hands?

A. Yes, sir, I sure did.

Q. And you never bagged them or submitted–well, you did bag them, but you never submitted them for fingerprint analysis, did you?

A. No, sir, I never submitted that for fingerprint analysis.

Q. So you don't know if he ever actually touched those items?

A. No, sir. I had attempted to submit them into–for fingerprint analysis and I was told by the Texas Ranger that it would be easier if he would comply and give me some DNA or some saliva and we could check the DNA compared to the screwdriver and the marker to see if he had had any dealings with it, and the simple reason was because of the ridge in the material that these items are made with are real hard to fingerprint.

* * *

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Q. All right. One of those is a permit to operate without plates issued in April of 2004 in the name of the defendant. Correct?

A. Yes, sir, that's correct.

Q. One of those is a permit issued in the month of May, year 2004, in the name of another person. Correct?

A. That's correct, sir.

Q. All right. And what was that name?

A. David Rodriguez Aleman.

Q. Okay. David Rodriguez Aleman?

A. Aleman, yes, sir.

Q. And on June 28, there's a permit issued in his name again. Correct?

A. And Humberto Fidel Regalado Cuellar, that's correct.

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Q. Which is his name?

A. Yes, sir.

Q. The whole thing. Right?

A. Yes, sir.

Q. So at one point in May of 2004, someone else had legal permission to operate that vehicle. Correct?

A. Yes, sir.

* * *

Redirect Examination by Ms. Burch

Witness: Danny Nunez

[147]

Q. **[BY MS. BURCH]** When you actually found–and I know that you weren't the

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person that found it, but when you became aware of the secret compartment that they found in the car, where was it?

A. **[DANNY NUNEZ]** The compartment was built between the engine compartment and the back seat, what I call the fire wall and what you would find as the fire wall inside the front end of your vehicle which separates you from the engine. After you come across your dashboard and then you've got that metal, well, this is what's behind in this VW, which the engine sits in the back.

Q. So it was in the back of the car?

A. That's correct, ma'am.

* * *

Direct Examination by Ms. Burch

Witness: Jason Chatham

[154]

Q. **[BY MS. BURCH]** How does he alert to the presence of the odor of narcotics?

A. **[JASON CHATHAM]** Brutus is an aggressive alert. You have aggressive alert and passive alert. Passive alert, when they detect the odor of a narcotic, they will sit. Aggressive alert, which Brutus is

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aggressive, he will scratch when he detects the odor of a narcotic.

Q. And does he give a certain type of alert based on whether it's–you said he's certified on marijuana, methamphetamine, cocaine, heroin. Does he give

a different kind of alert if it's cocaine as opposed to if it's marijuana?

A. No, that doesn't make a difference. No matter what the drug is, he's going to give the same type of alert. It doesn't vary from drug to drug.

Q. On the day in question, turning your attention to now, when you arrived on the scene, did you ask the defendant for consent to search his car using the dog?

A. I asked Trooper Nunez to ask him, because I was under the impression that the–he did not speak English. I asked Trooper Nunez to ask Mr. Cuellar if I could run the dog around his vehicle, and Trooper Nunez did ask him. Mr. Cuellar did consent to a K-9 search of the vehicle.

Q. And so what happened next?

A. Conducted a free-air search around the vehicle. During that time, Brutus alerted to the passengers's-side door. After he alerted, I put him inside the vehicle. He alerted to the Volkswagen in the driver's seat. That would be–I could best describe it like right down on this part of the driver's seat right here. And then in the back seat, bucket seats, if you will, between the front driver's seat, came through here and

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gave an alert on the back seat, actually where the seat cushion–where you sit, in that area.

Q. After that happened, what did you do?

A. After that happened, I took him out of the car, and Deputy Herbert requested that I had–use

him to check some money that Cuellar had, I believe in his pocket.

Q. Okay.

A. So I instructed Deputy Herbert to put the money–cash currency that Mr. Cuellar had in his pocket in the glove box of the Volkswagen, and we let the–after he–after Deputy Herbert put the money in the glove box, we waited approximately five minutes, give or take, and conducted another search on the–on the car again at that time. The reason being for asking him to put the money in the glove box, that was before–prior to–on the original K-9 search, an alert was not given on the glove box or anywhere in that area, so I was–determined that was a good place, not-contaminated place, if you will, to put the money.

Q. And once you– You said you put the money in and you let it stay a few minutes.

A. Yes, ma'am.

Q. And then did you–

A. Approximately five minutes.

Q. Did you run the dog again?

A. I did. I put him back inside the car. Once again, he

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alerted to the driver's seat, back seat, and the glove box–

Q. So–

A. –whereas, prior, he had not alerted to the glove box.

Q. So on this second time, he did alert to the glove box when he hadn't the first time?

A. That's correct.

* * *

[158]

Q. And what did you find, or did you find anything?

A. Well, while I was inspecting the car, I noticed things that kind of–I guess you would say would catch my attention. One of the most obvious things to me was behind the upright part of the back seat, there's an area that I–I referred to it as a cargo area. I don't know if any of you have seen a Volkswagen before, a bug, but behind the–let's say this is the back seat, the backrest of the seat. There's an area probably about the same size as this area right in here, about so deep. Inside this– This was a carpeted area. Behind the seat, it had two 6-by-9 type speaker boxes. Well, in this area, there was a lot of white hair–it looked like animal hair–that was concentrated on this–on this–within this carpeted area where the speakers were. That caught my attention for the reason being it looked–to me, it looked like it had been intentionally placed there. In training and experience with K-9 handling, I know a lot of times hair is put

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in a car–animal hair–in an attempt–I say an attempt because it doesn't work–to distract a K-9 doing a search. That caught my eye initially. And there were other things on the outside of the vehicle if you would like me to get into that.

Q. We would love to hear it.

A. Inspecting the rear of the vehicle– On a Volkswagen, on a beetle, the engine compartment is in the back. I was looking at the fire wall between the engine compartment and the interior of the vehicle. Up in the uppermost part of the fire wall, I noticed markings, heat stress marks that are commonly caused from when some–when you weld metal–if you weld something to a piece of metal on this side, it causes a heat stress mark on the back side. And I noticed that in the engine compartment. After I saw these heat stress marks, I went back into the inside of the car and started looking around to see what had caused these heat stress marks, what had been welded, and I noticed two–in the–in the–in the cargo area, the back seat being here, the cargo area, the fire wall being here, there were two upholstery tabs holding the carpet up. Removed the upholstery tabs, and that's where two–I saw that two bolts had been welded to the fire wall to hold these tabs.

Q. Did that seem unusual to you?

A. It did. It did seem unusual because it didn't–number one, the tabs didn't go with the vehicle. This is an old–old

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Volkswagen, and these tabs looked new. I mean, they weren't worn like–pretty much the rest of the car was pretty worn, and these looked like they were fairly new.

Q. So what did you do next?

A. I removed the tabs, and there again, I exposed the bolts that had been welded on to secure the carpet. Pulled the carpet back to expose the floorboard of the car and, at that time, observed that a piece of the floorboard had been cut out. A square approximately this long, this wide of the floor had been cut out and was secured with, I think, six metal screws securing the cutout back to the floor. I lifted a corner of the piece of the cutout, shined my flashlight down in there into a–what appeared to be a false compartment, and I observed bundles–gray duct-tape bundles–I guess these here–down in the–in this false compartment.

Q. And what did you do at that point?

A. At that point, I notified Deputy Herbert to handcuff Mr. Cuellar.

Q. And did you have any idea at that point what was in the bundles?

A. At that point, from my experience, seeing that narcotics are commonly packaged this way, I believed that these bundles contained some type of narcotic, and that's why I had ordered him to handcuff Mr. Cuellar.

* * *

[161]

Q. And what was in the bundles?

A. The bundles contained U.S. currency.

Q. Money?

A. Yes, money. I'm sorry. Yes. American money.

Q. Can you tell us what denominations of money were in the bundles? Were you part of unwrapping it and looking at that?

A. I observed the money after–as it was being counted. There were fives, tens, twenties, fifties, hundreds. Just all–pretty much every denomination, so . . .

* * *

Cross-Examination by Mr. Sloan

Witness: Jason Chatham

[163]

Q. **[MR. SLOAN]** None of this money was ever sent to a lab or anything, was it?

A. **[JASON CHATHAM]** To my knowledge, no, sir, it was not.

Q. As far as a control procedure of using another dog to see if he alerted to the money, that wasn't done. Correct?

A. No. I trust my dog, and I didn't think it was necessary.

Q. Okay. Well, taking money from another source and comparing his reaction, that wasn't done?

[164]

A. No, sir.

Q. You're aware, as a trained dog handler, that a substantial amount of money in circulation has enough drugs on it to taint–to alert a dog; isn't that right?

A. I have heard of that before. Yes, sir, I have heard of that.

* * *

[165]

Q. Okay. So what you can learn from the dog is basically there's an odor of one of the drugs he's been trained to detect somewhere where he's scratching; is that right?

A. Yes. If there is an odor of a narcotic–

Q. Okay.

A. –in a particular area, yes, that's what he alerts to.

Q. All right. So the dog can't tell you how that residue got–or how that odor got there. Correct?

A. No, no, he couldn't do that.

Q. In a group of bills, he can't tell you which bills have it on them and which bills don't?

A. I've never–I've never tried that, so I don't–I don't know that he could or he couldn't actually.

Q. Okay. The dog can't tell you how long ago the smell got on the money or–wherever it got?

A. No, he couldn't tell me that.

Q. The dog can't tell you how many other hands the money has passed through?

A. No, wouldn't say so.

* * *

Direct Examination by Ms. Williams

Witness: Richard Nuckles

[171]

Q. **[MS. WILLIAMS]** Can you estimate the number of narcotics trafficking investigations you have participated in during your law enforcement career?

A. **[RICHARD NUCKLES]** In the last 17 years, it would–I wouldn't be able to put a number on it. It would be hundreds, several hundred.

Q. In Texas, as well as Arizona?

A. That's correct.

Q. Have you had the opportunity during your career, your law enforcement career, to interview people involved in the narcotics trafficking business?

A. Yes, several hundred.

* * *

[172]

Q. You're familiar with how a smuggling–or a narcotics organization–the make-up of a narcotics organization?

A. Yes.

Q. Have you been qualified and testified in both state or federal court as an expert in the area of southwestern drug smuggling?

A. Yes, ma'am.

Q. Would you talk to the jury about narcotics organizations. How do they operate?

A. A narcotics organization is a business. It's an illegal business, but it is a business. It's put together to make money. Marijuana is grown basically on plantations in northern Mexico. It is processed from those plantations, and then it is

either smuggled across the United States/Mexico border by the individual who is in charge of the plantation or owns the plantation, or the marijuana is sold to several smugglers. A smuggler is somebody who actually moves it across the border or orchestrates that movement. So marijuana is sold to several different smugglers, who then make arrangements to have it moved across the U.S./Mexico border into the United States.

* * *

[173]

Q. Would you describe for the jury, from top, down, the kinds of jobs in a drug smuggling organization?

A. Usually if we're looking at it from a smuggling angle, as I said, a smuggler is the one who basically arranges or orchestrates the movement of marijuana across the U.S./Mexico border. Involved in that are individuals who procure equipment for that smuggler. They'll go out and buy cars. He has people who will build compartments in those cars if he's going to smuggle marijuana in a hidden compartment. They have–he has people who will actually package the marijuana and who actually load it into the vehicle and secrete it inside that vehicle.

* * *

[177]

Q. Within a drug smuggling organization, is there more concern about moving the marijuana or moving the cash that's generated?

A. In any drug smuggling organization, whether it's marijuana, cocaine, heroin, whatever they're moving, moving the dope is not the biggest problem. The largest problem that is

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faced by any drug smuggler, trafficker, any narcotics smuggling organization is what to do with their cash. Smuggling their cash is a lot harder or a lot more of a problem than smuggling the dope. They generate so much cash, and it is so huge an amount of paper in some cases, that they actually have a problem with just the bulk of their money and what to do with it. They can't, you know, just go down and deposit, you know, $100,000 in the bank without, you know, doing some paperwork that they don't want to do.

Q. What kind of paperwork has to be done if you deposit large sums of cash?

A. Well, for one thing, over $10,000, you have a cash transaction report that you have to fill out, and that entails giving a lot of personal information that they would rather not have known.

* * *

Q. So after people buy the marijuana in the United States and then somebody has all of this cash, what happens to all the

[179]

cash? Are people paid or does it all go back to Mexico? How does that work?

A. Well, the drivers are paid. The people who have participated in the movement of the marijuana are paid. But the bulk of it generally goes back to

Mexico, because the smuggler is the one who originated this entire process. He's going to get a large cut of the profit, and that money has to be moved back to him in Mexico.

* * *

A. Money is moved in a lot the same way that drugs are moved. They are hidden. The money is going to be hidden, and it's going to be basically taken in secret back down to Mexico. In order to get it into Mexico, they have to get it across the border once again. That's–basically people will hide it in compartments, they will hide it in the lining of luggage or

[180]

hide it in the sides of your door panels. There's hundreds of ways that money and drugs are hidden in vehicles or on somebody's person just to get it back across the border.

Q. You said that there are people along the way in various jobs and capacities that get paid. What are the different kinds of ways that someone might get paid for taking drug money back across the border?

A. Taking drug money back across the border, you're going to have basically someone who can hide it in the door panels, hide it in a secret compartment, somebody who is skillful in– Money is usually packaged in some way, wrapped in cellophane or duct tape or whatever, just to keep it in bundle shapes so it's easy to handle, and also to keep the amounts separate, $10,000 in each bundle, for instance. But you have someone who is skillful in hiding the money, and then you have

got to have somebody that is willing to drive it back into Mexico.

Q. If, for example, money is going to be taken back to Mexico in a car, is the driver necessarily the one that puts the bundles of money in the car?

A. No.

Q. Why–

A. Just like the driver is–

Q. Why is that?

A. Well, the driver is not the one who loads the marijuana in the car either, generally, to come north. The driver is the

[181]

driver. He gets paid to drive that vehicle. In a lot of cases, information is compartmentalized, and he doesn't need to know anything more than what he needs to drive that money into Mexico, so . . .

* * *

Q. Are you familiar with vehicles being registered first in one name and then in another, depending on who may be driving a load?

A. Yes. Vehicles are registered to the driver in a lot of cases. Sometimes this is because the vehicle is part of his payment for driving the load. It also negates suspicion on the

[182]

part of law enforcement if they stop this individual and the car is registered in his name.

* * *

Q. Would you describe for the jury what a cover scent, s-c-e-n-t, is, a cover scent?

A. Marijuana, because it has such a strong odor, is generally packaged in some way as to try to fool the drug dogs. I've seen it used–seen STP used between layers of cellophane to try to throw the dog off. Dryer sheets are a big one. They will have, you know, two or three boxes of dryer sheets packed in with it. Generally this doesn't work, but that's what it's used for.

* * *

[183]

A. If money were stored in the same place that marijuana was stored, the scent of the marijuana would permeate the money.

Q. And so the scent–do you have any idea how long the scent of marijuana would stay on money?

A. I really don't know. I have no idea. I think it would depend a whole lot on the conditions on which the scent was transferred to the money. Marijuana has a very strong odor when it's kept in, say, a hot environment, like an outdoor storage building at 110 degrees in the summertime, that sort of thing, has a very, very strong odor, whereas, you know, at 30 degrees in that same building, it may not put out as much odor.

Q. If it's tightly packaged, would it contain the odor stronger and longer?

A. If it was tightly packaged, I would assume it would, yes, because it was–you're containing that odor.

* * *

Q. Would you describe for the jury ways in which you know that drugs or drug money has been placed into someone's car without the driver actually being there and seeing it done?

[184]

In other words, is the car taken from a parking lot, loaded up, and then brought back to them?

A. Okay. I didn't understand your question there.

Q. I'm sorry.

A. Yes. If a load vehicle bringing marijuana from the border to Dallas, for instance–his destination is Dallas. It may go somewhere with someone else, you know, after that, but his destination is Dallas. He drives it to, say, a motel parking lot, just for an example. He will leave the keys under the floor mat, leave the car unlocked, and he will be instructed to get a room for 24 hours. He'll go in and get a room, and the next morning he will come back outside. His car is there, but the marijuana that was in his car is gone. During the night, someone has taken his car, unloaded the marijuana from the car, and brought the car back to the parking lot. Sometimes there is money in the dashboard–or in the glove compartment or hidden up under the dashboard, that sort of thing, that is his payment for bringing it up there. In that way, the driver that has brought the marijuana up never sees the recipients. He doesn't know who he delivered the marijuana to, but it was successfully delivered and he was paid.

Q. And can the same–does the same thing happen with money going back the other direction?

A. Yes. If they want–if–they can unload the marijuana and put the money right back in the same compartment for that

[185]

matter, and he understands that after he comes back out the next morning, the marijuana is gone and the money is there; he's supposed to take the money back to whoever hired him in the first place in Mexico.

* * *

Cross-Examination by Mr. Sloan

Witness: Richard Nuckles

[188]

Q. **[MR. SLOAN]** Would you agree that, at street level, the Mexican economy is largely a cash-based economy?

A. **[RICHARD NICHOLS]** From what I've seen, yes, quite a bit.

Q. And in a border town like Acuna or Juarez, an American

[189]

dollar will buy just about anything a peso will buy. Right?

A. Yes.

* * *

[192]

Q. You said sometimes the mule doesn't even know what he's carrying.

A. Right. He knows he's carrying narcotics, but he doesn't know whether it's marijuana, cocaine, heroin, whatever.

Q. Okay. Presumably, mules smuggling other items, same kind of procedure is followed?

A. Yes.

Q. Sometimes the mule isn't even told where he's going. Right? He's told to go meet somebody and they will tell him where to go. Right?

A. Well, usually he has a town that he's going to. He may have to make a phone call once he gets there and further

[193]

arrangements are made as far as a meeting spot.

Q. One of the things that the mule isn't told is the correct name of whoever is giving him the stuff. Right?

A. In most cases. The mule– You're talking about the smuggler, right, that's giving him the marijuana to take north?

Q. That's right.

A. The smuggler usually is going to be known to the driver, or at least some lieutenant of the smuggler is going to be known to the driver. The driver usually is not aware of who the recipients are. In my Dallas example a while ago, the driver is usually not going to know who comes in the night and picks up his vehicle while he's asleep in a motel room. He'll never meet those people.

Q. Okay. So in terms of if the load gets intercepted or the mule gets intercepted, the less information

he has, the better it is for people higher up, because that's less that he can tell the authorities on. Right?

A. For the most part.

Q. You said that in moving currency, hidden compartments are sometimes used in vehicles. Correct?

A. Yes.

Q. Presumably those kind of compartments would be used for any kind of money smuggling. Right?

A. Sure.

* * *

[194]

Q. Okay. You indicated that the use of plastic and duct tape and masking things can be used to try to limit the smell of the drugs or the money. Correct?

A. Yes.

* * *

[195]

Q. So the ideal courier, if he's intercepted, is a person who can't name names or give information to move the investigation up the ladder. Right?

A. Sure.

* * *

Direct Examination by Mr. Sloan

Witness: Humberto Fidel Regalado Cuellar

[201]

Q. **[MR. SLOAN]** What do you do for a living?

A. **[HUMBERTO CUELLAR]** I'm a small businessman. I buy and sell vehicles.

Q. Where do you buy them?

A. Here in the U.S.

Q. Where do you sell them?

A. In Mexico. I always sell them in Mexico.

Q. Why do you sell American cars in Mexico?

A. Because sometimes you make twice as much benefit on them there. You can purchase a vehicle here for five hundred, seven hundred dollars and sell it in Mexico for about a thousand.

Q. In the course of your business, do you have authorization to cross the border?

A. Well, I pay my taxes in Mexico, and every time that I

[202]

purchase a vehicle, I do have to pay taxes to the Mexican government for the sale of that vehicle.

Q. Okay. Are you allowed to cross the border legally?

A. Yes. I have been crossing the border legally for over four years.

* * *

[210]

Q. Okay. At some point, were you stopped by the police?

A. After leaving Eldorado, probably about 20 to 30 miles outside of San Angelo, the car broke down.

The switch did not work. The gear stick wasn't working anymore, and I had to drive about 18 miles an hour. And as I said, you know, leaving San Angelo, probably about 10 miles or so near Eldorado, the car stopped working, and I–all that I could drive it at was at 18 miles per hour, and I figured I would have to drive all the way to Acuna at that speed. At Eldorado, I stopped again, and I looked at another vehicle, but I didn't see the price. And right outside of Eldorado, the officers stopped me.

* * *

[235]

MR. SLOAN: Your Honor, I would also make a Rule 29 motion at this time. I don't believe that the--I think that the government has failed to establish the elements of their case. I would ask that you direct a judgment of acquittal.

THE COURT: That motion is denied.

* * *

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No. 06-1456

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a conviction for money laundering under 18 U.S.C. § 1956(a)(2).

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CASES

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Grunewald v. United States,
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Hughey v. United States,
495 U.S. 411 (1990) 37

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 23

James v. United States,
127 S. Ct. 1586 (2007) 37

Powerex Corp. v. Reliant Energy Servs.,
127 S. Ct. 2411 (2007) 23

Ratzlaf v. United States,
510 U.S. 135 (1994) 37

United States v. Anderson,
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United States v. Awan,
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957 F.2d 1330 (6th Cir. 1992) 27

United States v. Bockius,
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United States v. Castaneda-Cantu,
20 F.3d 1325 (5th Cir. 1994) 26

United States v. Corchado-Peralta,
318 F.3d 255 (1st Cir. 2003) 22

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(continued)

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United States v. Dimeck,
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United States v. Herron,
97 F.3d 234 (8th Cir. 1996)..... 22

United States v. Johnson,
440 F.3d 1286 (11th Cir. 2006).....23, 41

United States v. Khan,
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United States v. Kozminski,
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United States v. Majors,
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United States v. McGahee,
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United States v. Neal,
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United States v. Salazar,
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TABLE OF AUTHORITIES
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United States v. Stephenson, 183 F.3d 110 (2d Cir. 1999) 22

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76 (1820) 37

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 15

STATUTES

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31 U.S.C. § 5332 ..... passim

Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) 15

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) 32, 33, 34

LEGISLATIVE MATERIALS

147 Cong. Rec. S109909-02 (2001) 34

Current Problem of Money Laundering: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. (1985) 16, 29, 30

General Accounting Office, *Investigating Money Laundering and Terrorist Financing: Testimony Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources, H. Comm. on Gov. Reform* (May 11, 2004) 17-18

TABLE OF AUTHORITIES
(continued)

Page(s)

H.R. Rep. No. 107-250(I) (2001) 34, 35

H.R. Rep. No. 99-855 (1986) 24, 30

Money Laundering Act of 1985, H.R. 1367, 99th Cong. (1985) 29

Money Laundering and Related Crimes Act of 1985, H.R. 2786, 99th Cong. (1985) 29

Money Laundering and Related Crimes Act of 1985, S. 1335, 99th Cong. (1985)..... 29

Money Laundering Crimes Act, S. 572, 99th Cong. (1985)..... 29

Money Laundering Crimes and Disclosure Act of 1985, S. 1385, 99th Cong. (1985) 29

Money Laundering Legislation: Hearing Before the S. Comm. on the Judiciary, 99th Cong. 1 (1985) 19

S. Hrg. 107-641 (September 26, 2001)..... 34

S. Rep. No. 99-433 (1986)..... 30

OTHER AUTHORITIES

2007 National Money Laundering Strategy.....24, 34, 35

American Heritage Dictionary of the English Language (4th ed. 2000) 40

Black's Law Dictionary (8th ed. 2004) 15

Money Laundering, 39 Am. Crim. L. Rev. 839 (2002) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Money Laundering: Funds derived from criminal activities, http://www.interpol.int/Public/FinancialCrime/MoneyLaundering/default.asp (Dec. 5, 2007) 18

Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, *Money Laundering Offenders, 1994-2001* (2003) 16

Oxford English Dictionary (2d ed. 1989) 15

President's Comm'n On Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, And Money Laundering* (1985) 17, 18, 19

William R. Schroeder, *Money Laundering: A Global Threat and the International Community's Response*, FBI Law Enforcement Bulletin (May 2001) 16, 18, 22, 24

Webster's Third New International Dictionary of the English Language, Unabridged (1993) 40

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, is reported at 478 F.3d 282 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-44a. The panel decision is reported at 441 F.3d 329 and is reprinted at Pet. App. 45a-56a. The district court's judgment is unreported and is reprinted at Pet. App. 57a-62a.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The judgment of the en banc United States Court of Appeals for the Fifth Circuit was entered on February 2, 2007. The petition was filed on May 3, 2007, and it was granted on October 15, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The money laundering statute at issue, 18 U.S.C. § 1956, is reproduced in the appendix to the petition. Pet. App. 63a-74a.

STATEMENT OF THE CASE

The question in this case is whether the mere act of hiding the proceeds of unlawful activity while transporting those proceeds suffices to establish the federal statutory crime of concealment money laundering under 18 U.S.C. § 1956(a)(2). According to the decision below, the answer to that question is yes. Pet. App. 13a ("simply taking steps to hide il-

licit funds is sufficient"). But according to the text, background, and purpose of the statute, as well as the rule of lenity that informs its construction, the answer must be no – proof that a defendant took steps to keep illicit funds hidden while transporting them establishes only that the money was *hidden*, not that it was *laundered*. As the Government concedes, the statute plainly requires evidence sufficient to establish not just that the money was concealed during transportation, but that the "design" of the transportation – i.e., its purpose – was to *result* in the prohibited concealment. But contrary to the Government's submission, the intended "concealment" prohibited by the statute means more than intent merely to hide the money itself at the end of the journey – one does not "launder" money by secreting it in a closet or burying it in mason jars. Instead the statute requires proof that the defendant sought to *cleanse the money of its taint of criminality* by concealing certain *attributes* of the money that expose its illegitimacy. Absent evidence distinctly establishing that particular unlawful purpose of the transportation, proof that a defendant kept illicit funds hidden while transporting them cannot suffice to sustain a money laundering conviction. Because the evidence here shows only that petitioner Cuellar hid the money during transport – and discloses nothing about the purpose for which it was being transported – his money laundering conviction must be reversed.

A. Statutory Background

The principal federal money laundering statute, 18 U.S.C. § 1956(a), includes separate transaction

and transportation paragraphs, which provide in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> * * *
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
>
> * * *
>
> shall be sentenced to . . . imprisonment for not more than twenty years . . . .
>
> * * *
>
> (a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –
>
> * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity

> and knowing that such transportation, transmission, or transfer is designed in whole or in part –
>
> > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
> >
> > * * *
> >
> > shall be sentenced to . . . imprisonment for not more than twenty years . . . .

18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). Each provision also includes its own distinct "promotion" prong, which makes it a crime to conduct a financial transaction involving illicit property or to transport illicit funds "with the intent to promote the carrying on of specified unlawful activity." *Id.* § 1956(a)(1)(A), (a)(2)(A).

B. Factual Background

The Stop, Search, and Arrest. Near sunset on the evening of July 14, 2004, Humberto Fidel Regalado Cuellar was heading south on Texas Highway 277. J.A. 13-14. He had just passed Eldorado, Texas and was approximately a hundred miles from his home in the border town of Acuña, Mexico. J.A. 15. Cuellar was driving well below the posted speed limit because his Volkswagen Beetle, a 1994 Mexican model manufactured with the engine in the back, was having mechanical difficulties. J.A. 13-14, 40, 73. Deputy Kevin Herbert of the Schleicher County Sheriff's Department in Eldorado was heading the opposite direction on Highway 277 when he noticed Cuellar's car traveling at a low speed and

saw it swerve onto the shoulder. J.A. 13-15. The deputy turned around and began to follow the vehicle. *Id.* Once behind the VW, he observed that it had no registration or license plate and so he pulled it over. *Id.*

Realizing Cuellar did not speak English, Deputy Herbert, who does not speak Spanish, summoned a bilingual state trooper. J.A. 15-17. While waiting for the trooper to arrive, however, Herbert continued his investigation. He asked for Cuellar's driver license and insurance in "the best Spanish [he] could do." J.A. 16-17. Cuellar provided his Mexican driver license. *Id.* Herbert then repeatedly requested proof of insurance but because of the "little problem understanding each other," Cuellar went to the front of the car and opened the storage trunk of the Beetle. J.A. 21-22, 35-36, 38-39. He then provided a stack of other paperwork from the vehicle. J.A. 20-22. The paperwork indicated that the car likely did belong to Cuellar: it included three Mexican permits to operate a vehicle without license plates, two of which were in Cuellar's name,[1] and a traffic ticket Cuellar received while driving the VW in Mexico four months earlier. J.A. 33-34, 48-49. However, Cuellar had also handed over tickets showing he had traveled through Texas by bus, not by car, in the past few days. He had left the day before from Del Rio (directly across the border from Cuellar's home in Acuña), ridden to San Antonio, then to Big Spring,

---

[1] Cuellar testified at trial that he needed such permits because he was a small businessman who bought cars in the United States and sold them in Mexico on a regular basis. J.A. 72-73.

and finally to Amarillo, arriving early that morning of July 14. J.A. 20-25.

At this point, Trooper Danny Nuñez from the Texas Department of Public Safety arrived to continue the investigation in Spanish. J.A. 17. He asked about insurance and Cuellar stated that he did not have any proof of insurance with him. J.A. 17-18, 35-36. Nuñez noticed a bulge in Cuellar's left front pocket and asked what he was carrying. J.A. 37-38. Cuellar replied that it was money and identification. *Id.* When Nuñez asked how much money it was, Cuellar said $1,600.[2] J.A. 50-51. Cuellar then provided the roll of money to Nuñez at his request. J.A. 17-18, 37-38. Deputies Nuñez and Herbert claimed they could smell "raw" marijuana on it. J.A. 25-26, 38.

During further questioning, Cuellar provided details about his route around Texas, the ownership of the VW, and the source of the cash in his pocket. Nuñez claimed his suspicions were raised by purported inconsistencies in Cuellar's answers,[3] and by

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[2] According to the transcript from the videotape of the arrest admitted at trial, Cuellar responded that he had $1,600. J.A. 50-51. Trooper Nuñez testified that Cuellar first said $600, but when asked to state the amount again, he changed it to $1,600. *Id.*

[3] Cuellar said he was coming home from San Angelo where he had been shopping for a truck, and that he had been in Texas for three days. J.A. 17-18, 37-38. Trooper Nuñez noted that he thought this was strange because Cuellar had no luggage, clothing, or toiletries. J.A. 22, 43-44. Further, Cuellar did not mention going through Big Spring that day, but a fast food receipt found in his car indicated he had been there a few hours earlier. J.A. 18-21, 43-44.

the amount and odor of the money in his possession, and so instructed Herbert to summon a canine unit. J.A. 25-26, 38, 44-45. Herbert also called border patrol to check Cuellar's immigration status and found that he was a Mexican national with proper authority to cross the border. J.A. 26.

While waiting for the canine unit, the two officers started to search the vehicle with Cuellar's consent. J.A. 17-18, 25-25, 38-39, 44-45. They noticed several alterations to the VW: the fender walls had drill marks on them, the gas tank had been tampered with, the floors had new carpet, and the exterior had mud splashes that appeared to have been created by a machine. J.A. 24-25, 40-43. Further, there was white animal hair on the floorboard behind the back seat. J.A. 42-43, 57-58.[4] These observations led the officers to believe that the VW was being used, or had been used, to transport narcotics. J.A. 40-45.

Deputy Chatham of the Schleicher County Sheriff's Department and his dog arrived. J.A. 25-26, 44-45. The dog was trained to detect narcotics, and alerted on the driver's seat and on the back seat. J.A. 55-57.[5] Chatham started searching around the

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[4] Deputy Chatham testified that animal hair is used by couriers to disguise the odor of narcotics. J.A. 57-59. Cuellar stated the hair was from transporting goats in the car. J.A. 42-43, 57-58.

[5] The dog later alerted to the cash found in Cuellar's pocket when the officers placed it in the glove box. J.A. 56-57. But Deputy Chatham testified that a substantial amount of money in circulation has sufficient odor to cause a drug dog to alert. J.A. 61. He also testified that there was no way to tell how long ago the narcotics odor had affixed to the cash. J.A. 60-62.

rear of the vehicle. He pushed aside two speakers that were sitting behind the back seat, pulled the carpet away from the floor, and found a removable plate secured with Phillips-head screws. J.A. 27-30. He shined his flashlight under a raised area of the metal plate into a void between the engine compartment and the back seat. J.A. 27, 46-47, 54, 59-60. Seeing some duct-taped bundles, and assuming they contained narcotics, he immediately directed Deputy Herbert to handcuff and arrest Cuellar. J.A. 46-47, 59-60.

Law enforcement transported Cuellar and the VW to the Sheriff's office for further investigation. J.A. 27-28. Cuellar, not yet aware of the discovery of the bundles, was not allowed to call his family despite his pleas that if he did not do so by midnight, they would be "floating down a river." J.A. 49-50. The trooper and deputies proceeded to remove the metal plate, exposing seven bundles in a secret compartment. J.A. 29-30, 47. Each bundle contained approximately $10,000 in cash, wrapped first in a blue Wal-Mart shopping bag, then in silver duct tape, and finally marked with the bundle's dollar amount in black ink. J.A. 29-30, 47-48. In total, $83,235 was found and seized, including the cash found on Cuellar's person and that found in the compartment. J.A. 30-31.[6]

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[6] The night of the arrest, Deputy Herbert and the sheriff took the cash back to their office, photographed it, and placed it in the evidence vault. J.A. 32-33. The next morning they deposited it in their own Schleicher County account "so [they] weren't hanging onto all that money." J.A. 30-31. This act put the currency back into circulation and was done without first performing residue or any other tests on it (and incidentally,

C. Procedural Background

1. A Texas federal prosecutor secured an indictment against Cuellar for international money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i). He was not charged with bulk cash smuggling, a crime that he conceded he committed, Pet. App. 30a n.10, and for which the maximum potential prison term is five years – fifteen years less than for money laundering, *see* 31 U.S.C. § 5332(a). The jury convicted Cuellar in October 2004.[7] Trial counsel filed a Rule 29(a) acquittal motion for insufficiency of the evidence at the close of the Government's case, J.A. 74, and filed a Rule 29(c) acquittal motion after trial. J.A. 3. Both were denied. The district court sentenced Cuellar to 78 months imprisonment in January 2005. Pet. App. 58a.

2. A divided panel of the Fifth Circuit reversed Cuellar's conviction. The court found that the Government failed to prove that Cuellar knew the transportation had been "designed to conceal." To commit money laundering under § 1956(a)(2), the panel held, the accused must know that an underlying purpose of the transportation is to conceal or disguise the nature, location, source, ownership or control of illegal

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without first removing the allegedly strong marijuana odor). J.A. 32-33. The seized cash was therefore unavailable as evidence at trial. *Id.*

[7] In addition to the testimony of the three law enforcement officers involved in the arrest, Special Agent Richard Nuckles of U.S. Immigration and Customs testified regarding drug trafficking operations, including the fact that they often involve the flow of cash proceeds from drug sales from the United States to Mexico. J.A. 65-66.

proceeds. Pet. App. 49a-50a. The panel majority held that the evidence failed as a matter of law to show that the transportation was designed to conceal the money's attributes, much less that Cuellar knew of any such design. *Id.*[8]

Holding that "concealment" must be construed the same way in transportation money laundering under § 1956(a)(2) as it is in transaction money laundering under § 1956(a)(1), Pet. App. 50a n.4, the panel found that the Government failed to meet its burden because it did not show that Cuellar knew of a design to "'create the appearance of legitimate wealth' by smuggling drug money across the border," *id.* at 51a-52a, even if it *did* show that Cuellar knew he was hiding drug money and that he was planning to drive it across the border, *id.* at 49a. Whereas hiding money during transportation to facilitate money's movement may amount to bulk cash smuggling under 31 U.S.C. § 5332(a), *id.* at 52a n.5, it does not evidence a plan to conceal the money on the other end as is required for money laundering, *id.* at 50a.

3. The Fifth Circuit granted the Government's petition for rehearing en banc. Judge Davis authored the en banc opinion, vacating the panel decision from which he had dissented and affirming Cuellar's conviction for money laundering. Pet. App. 1a-2a. The en banc court held that "simply taking

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[8] The panel specifically held that Cuellar lacked the requisite knowledge of any potential laundering: "Even if such evidence [of a design to conceal] had been presented, the government would also have had to show that Cuellar knew his actions were designed to help launder the money." Pet. App. 52a.

steps to hide illicit funds is sufficient to prove concealment" for international money laundering. *Id.* at 13a; *see id.* at 10a (concluding that the statute does not "requir[e] proof of a plan to conceal the funds once they reach the ultimate destination outside the country"). The mere fact that Cuellar had taken steps to conceal the funds in his car rather than transport them openly, the court held, sufficed for a money laundering conviction. *Id.* at 10-11a.

Judge Smith authored a vigorous dissent that Judges DeMoss and Dennis joined. The dissent insisted that the statute requires proof that defendant knew of a design to create the appearance of legitimate wealth, pointing to the statutory title, legislative history, case law, and interpretive canons, including the rule of lenity. Pet. App. 25a-39a. That design to conceal the money's illicit characteristics – and thereby to create the appearance of legitimate wealth – was absent here, even if Cuellar might have been charged with other federal crimes. Pet. App. 44a.

SUMMARY OF ARGUMENT

I. Merely hiding the proceeds of unlawful activity while crossing the U.S. border is not a money laundering offense. All available evidence, including the text, background, and purpose of the money laundering statute, compels the conclusion that it reaches only concealment that creates the appearance of legitimate wealth. This is how money laundering has traditionally and universally been understood, and this is how it is defined by the statute. Rather than criminalizing concealment of the bare existence of illicit proceeds, the money laundering statute specifically targets concealment of five attributes of

such proceeds that betray their illegitimacy. It is by concealing those attributes that criminal enterprises make their "dirty" proceeds appear to be innocently-derived funds, and thereby enjoy the profits of their illicit activities. Thus, when money is transported internationally for the purpose of cleansing it, a money laundering violation may be established. Absent evidence of such a purpose, however, no money laundering conviction can stand.

Congress clearly understood that § 1956(a) targeted traditional money laundering. The transaction provision of the statute was designed to punish and deter domestic transactions that remove the taint of criminality from the proceeds, and the transportation provision was added to intercept at the border those who would evade the transaction provision by smuggling their proceeds out of the country to be laundered abroad. The concealment element was considered necessary to ensure that the statute did not criminalize all international transportations of illicit proceeds. Moreover, Congress enacted an entirely separate statute to address bulk cash smuggling – the precise conduct for which Cuellar was convicted – in recognition of the fact that this conduct, without more, was *not* punishable as money laundering. It is thus clear that the money laundering statute requires proof of an intent to create the appearance of legitimate wealth. To the extent any doubt remains, the rule of lenity compels a narrow reading of the statute, resolving any ambiguities in favor of the petitioner.

II. The alternative interpretations suggested by the Fifth Circuit and the Government are untenable. The Fifth Circuit's conclusion that the concealment

element is satisfied by mere physical concealment in transit would turn the statute on its head, and criminalize concealment for the purpose of transportation rather than, as the statutory text requires, transportation for the purpose of concealment. The Government takes a different view – that a purpose to conceal is indeed required, but the concealment need be nothing more that hiding the money upon arrival and the purpose to conceal may be inferred simply because a defendant took "substantial" steps to conceal it en route. That reading is equally flawed, because in practice it means that all international transportation of proceeds would violate the statute.

III. Even if it were true that the a mere purpose to hide illicit funds upon arrival suffices to establish international money laundering, however, Cuellar's conviction would still have to be reversed because there was *no* evidence at trial suggesting that Cuellar was transporting the money so it could be secreted away in Mexico. To the contrary, the most plausible inference was that the purpose of the transportation was to *spend* the money, not conceal it.

For all of these reasons, Cuellar's conviction must be reversed.

ARGUMENT

I. UNDER 18 U.S.C. § 1956(a), PROCEEDS OF SPECIFIED UNLAWFUL ACTIVITY MUST BE CONCEALED BY CREATING THE APPEARANCE OF LEGITIMATE WEALTH

The Money Laundering Control Act of 1986 prohibits financial transactions involving the proceeds

of specified unlawful activity, as well as the international transportation, transmission, or transfer of such proceeds, "knowing" that the transaction or transportation "is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). The basic question in this case is whether that provision is satisfied by mere proof that the defendant concealed the *existence* of the proceeds by physically hiding them from public view, or whether it requires proof that the defendant knew the transportation was part of a plan to conceal those *attributes* of the proceeds that betray their illegitimacy, thereby making the proceeds appear legitimate. As demonstrated below, the statute's text, function, and purposes, as well as the rule of lenity – a crucial aid in the construction of any criminal statute – all compel the latter construction. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (alterations and quotation omitted)).

A. Section 1956(a) Addresses The Specific Evil Of Money Laundering, Which Requires The "Cleansing" Of Illicit Money Or Property To Make It Usable

The statute at issue here criminalizes the act of "money laundering," as reflected in the titles of both the legislation, the Money Laundering Control Act of

1986, Pub. L. No. 99-570, 100 Stat. 3207, and the relevant code section, "Laundering of monetary instruments," 18 U.S.C. § 1956. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (title of statute may "shed[] light on some ambiguous word or phrase in the statute itself" (internal citations and quotations omitted)). As a matter of plain English, to "launder" money "is to disguise illegally-obtained money by making it appear legitimate." Pet. App. 26a; *see* 8 *Oxford English Dictionary* 702 (2d ed. 1989) (to launder money is "to transfer funds of dubious or illegal origin, usually to a foreign country, and then later to recover them from what seem to be 'clean' sources"); *Black's Law Dictionary* 1027 (8th ed. 2004) (stating that money laundering is "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"); *accord United States v. Dimeck*, 24 F.3d 1239, 1247 (10th Cir. 1994) ("The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises."); *United States v. Majors*, 196 F.3d 1206, 1212 n.12 (11th Cir. 1999) ("The activity that Section 1956(a)(1)(B)(i) seeks to prevent is the injection of illegal proceeds into the stream of commerce while obfuscating their source.").

Money laundering generally involves "a three-step process: (1) the criminally derived money is 'placed' into a legitimate enterprise; (2) the funds are 'layered' through various transactions to obscure the original source; and (3) the newly laundered funds are integrated into the legitimate financial world in

the form of bank notes, loans, letters of credit, or other recognizable financial instruments." *Money Laundering*, 39 Am. Crim. L. Rev. 839, 840 (2002) (quotation omitted); *see* William R. Schroeder, *Money Laundering: A Global Threat and the International Community's Response*, FBI Law Enforcement Bulletin 2 (May 2001) ("FBI Bulletin"), *available at* http://www.fbi.gov/publications/leb/2001/may01leb.pdf.

The understanding that the criminal act of money laundering necessarily includes the *laundering* component – i.e., the "cleansing" of "dirty" funds or property to make them appear legitimate – has been uniformly acknowledged across the U.S. criminal law enforcement community. "Traditionally, U.S. law enforcement has viewed laundering as the 'washing' of illicit funds, through having the cash *appear to be legitimately produced profits from a 'clean' business . . . .*" *Current Problem of Money Laundering: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 303 (1985) ("*Hearings*") (statement of Bonni G. Tischler, Dir., Fin. Investigations Division, U.S. Customs Service) (emphasis added). The U.S. Department of Justice has described it the same way: "Money laundering is defined as 'the process by which criminals or criminal organizations seek to disguise the illicit nature of their proceeds *by introducing them into the stream of legitimate commerce and finance.*'" Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, *Money Laundering Offenders, 1994-2001*, at 1 n.1 (2003), *available at* http://www.ojp.usdoj.gov/ bjs/pubalp2.htm (quoting U.S. Dep't of the Treasury, 2000-2005 Strategic

Plan, at 1) (emphasis added). The President's Commission on Organized Crime, which spearheaded the effort to enact the current money laundering statute, likewise defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, *and then disguises that income to make it appear legitimate.*" President's Comm'n On Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, And Money Laundering* ("*Cash Connection*") 7 (1985) (emphasis added).[9] The Government Accountability Office has similarly defined money laundering as "the process of disguising or concealing illicit funds *to make them appear legitimate.*" General Accounting Office, *Investigating Money Laundering and Terrorist Financing: Testimony Before the Subcomm. on Criminal*

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[9] The report offered examples of the types of activities a money laundering statute should reach, all of which involve efforts to legitimize the funds and make it more difficult for law enforcement to trace them to the underlying illicit activity:

> payments to the Gambino family that were transferred through three bank accounts, including one in Switzerland, then withdrawn and placed into a safe deposit box; secretion into Swiss bank accounts, by the head of the New Orleans family of La Cosa Nostra, of $1.8 million that had been extorted from the Teamsters; a drug trafficker's practice of making numerous small deposits, totaling over $500,000, into a casino account, gambling a small amount, and then withdrawing the balance from the account in the form of checks made out to third parties, which were deposited in a securities firm before withdrawal; and the Hell's Angels' use of drug proceeds to purchase, through front men, failing businesses and real estate to legitimize the cash.

Pet. App. 28a-29a.

Justice, Drug Policy, and Human Resources, H. Comm. on Gov. Reform (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) (May 11, 2004), *available at* http://www.gao.gov/new.items/ d04710t.pdf. *See also* FBI Bulletin, *supra*, at 2 (money laundering is "the process used by criminals through which they make 'dirty' money appear 'clean'").[10]

The act of laundering illicit funds and property by making them appear legitimate is considered so problematic in criminal law enforcement because it both incentivizes and facilitates the underlying criminal schemes that produce the illicit gains. *See* FBI Bulletin, *supra*, at 3 ("laundering increases the threat posed by serious crime, such as drug trafficking, racketeering, and smuggling, by facilitating the underlying crime and providing funds for reinvestment that allow the criminal enterprise to continue its operations"). As the President's Commission on Organized Crime explained in its report to Congress urging the adoption of the current federal money laundering statute, the ability to make "cash generated by criminal enterprises appear to come from a legitimate form" is a necessary link in allowing organized crime to "flourish." *Cash Connection*, *supra*,

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[10] Money laundering is similarly defined by law enforcement officials in other countries. For example, the Interpol General Assembly's working definition of money laundering is "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources." *Money Laundering: Funds derived from criminal activities*, http://www.interpol.int/Public/ FinancialCrime/MoneyLaundering/default.asp (last visited Dec. 5, 2007).

at 3. Its Chairman emphasized that "money laundering is the lifeblood of organized crime," and that depriving organized crime of "the ability to freely utilize its ill-gotten gains" would deliver "a crippling blow" to crime syndicates. Letter from Irving R. Kaufman, Chairman, President's Commission on Organized Crime, to Ronald Reagan, President of the United States (Oct. 1984) (reproduced in *Cash Connection* at iii).

In short, the fundamental policy concern underlying the money laundering statute is that many "criminal groups . . . could not reap the profits of their unlawful activity without the means to camouflage their proceeds to appear as though they came from legitimate sources and business investments." *Money Laundering Legislation: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 1 (1985) (statement of Chairman Thurmond). Absent "a means to convert its illicit earnings into other forms of wealth," in other words, a criminal organization "could not reinvest its illegal proceeds in ways that allow it to continue and expand its operations, and it could not so readily spread its corrupt influence." *Id.* at 74 (statement of David D. Queen, Acting Assistant Sec'y for Enforcement and Operations, Dep't of the Treasury). The money laundering statute was thus enacted pursuant to a "clear bipartisan recognition of the need . . . to aid law enforcement in eliminating the huge profits reaped by sophisticated money laundering techniques." *Id.* at 1 (statement of Chairman Thurmond).

B. The Text Of § 1956(a) Requires Proof Of "Laundering" As Traditionally Understood

1. In the Money Laundering Control Act as it was finally enacted, Congress criminalized two closely related types of conduct: the laundering of illicit property through "financial transactions," 18 U.S.C. § 1956(a)(1), and the transfer or transportation of illicit funds from the United States to a foreign country (or vice versa), so that they can be laundered elsewhere, *id.* § 1956(a)(2).

The two provisions of the statute criminalize different acts – transactions versus international transportation – but otherwise have materially identical elements, as pertinent here:

(1) The defendant must "know[]" the property or funds "represent[] the proceeds of some unlawful activity." *Id.* § 1956(a)(1), (a)(2)(B).

(2) The property or funds must in fact represent "the proceeds of specified unlawful activity," *id.* § 1956(a)(1), (a)(2)(B)(i) – i.e., specific offenses listed in § 1956(c)(7).

(3) The defendant must "know[]" that the transaction or transportation is "designed in whole or in part" to "conceal or disguise [1] the nature, [2] the location, [3] the source, [4] the ownership, or [5] the control of the proceeds of specified unlawful activity." *Id.* § 1956(a)(1)(B), (a)(2)(B)(i).

The final element is the crucial "laundering" requirement – the transaction or transportation must be "designed" to "conceal or disguise" not merely the proceeds themselves, but particular *attributes* of il-

licit proceeds that would reveal them to be illicit. "The statute's focus is on these characteristics of illegal proceeds because they are the characteristics which, when concealed or obliterated, allow illegal proceeds to be passed into commerce as legitimate proceeds more easily." *Dimeck*, 24 F.3d at 1246. By concealing or disguising those attributes that would expose the illegitimacy of the funds, the type of transaction or transportation prohibited by the statute will necessarily have the effect of making the funds appear to be legitimate. Section 1956(a) thus fulfills the statute's aim of prohibiting the *laundering* of illicit money or property – rather than merely secreting it from view – so that criminal enterprises cannot make them usable for purpose of profit or reinvestment in further criminal activity.

2. This straightforward reading of the text of § 1956(a) is confirmed by its overall structure. As noted, the provision addresses two types of conduct involving illicit proceeds – financial transactions and international transportation. The "transaction" provision plainly can apply only to transactions designed to make property appear legitimate, because that is logically the *only* way a transaction can "conceal or disguise" the relevant attributes of illicit property. A transaction is not a tangible opaque thing, like a vault or a wall, that can be employed to hide money or property from prying eyes. It is impossible to conceal or disguise the *existence* of money during a transaction – the money or property remains as plain to see physically as it ever was. A transaction thus can "conceal" property only by disguising its ownership, location, control, etc., such that the property appears to be the product of le-

gitimate commercial activity. *See* FBI Bulletin, *supra*, at 3 (describing use of "layering" transactions "to increase the difficulty of tracing the proceeds back to its illegal source"). Numerous cases decided under § 1956(a)(1) illustrate this point.[11]

The same must be true for the acts of concealment or disguise by international transfer or transportation criminalized by § 1956(a)(2). The two provisions use identical language – to be unlawful, both the transaction and the transportation must be "designed in whole or in part" to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). If

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[11] Merely transferring illicit funds from one account to another, *United States v. Esterman*, 324 F.3d 565, 570-72 (7th Cir. 2003), or writing checks on an account with illicit funds, *United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001), cannot constitute money laundering because neither activity does anything to conceal or disguise the illegitimacy of the funds. Likewise, merely *spending* the proceeds of illicit activity does not conceal or disguise their illegitimacy and thus does not constitute money laundering under § 1956(a)(1), as the Government concedes. U.S. Br. Opp. 14; *see United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999) ("Joining a number of other circuits, we hold that Subsection (i) of the money laundering statute does not criminalize the mere spending of proceeds of specified unlawful activity."); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) ("If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute."); *see also United States v. Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003); *United States v. Dobbs*, 63 F.3d 391, 398 (5th Cir. 1995); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996); *Majors*, 196 F.3d at 1213.

the "conceal or disguise" element under § 1956(a)(1) requires proof that defendant knew of a design to make the property appear legitimate, the same words – "conceal or disguise" – must mean the same thing under § 1956(a)(2). *See Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2417 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("the normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *see also United States v. Ness*, 466 F.3d 79, 81 n.1 (2d Cir. 2006) (applying rule to § 1956(a) because "the relevant concealment language is identical for both provisions"), *pet. for cert. filed*, No. 06-1604 (June 1, 2007); *United States v. Johnson*, 440 F.3d 1286, 1291 n.4 (11th Cir. 2006) (same), *cert. denied*, 128 S. Ct. 262 (2007).

Identical words can have different meanings, of course, when it is apparent that Congress used them in different contexts to achieve different objectives. But here there is absolutely no indication that Congress intended to address distinct evils in the two provisions, rather than two means of achieving the same criminal end – i.e., the cleansing of proceeds to make them usable by the criminal organization. In fact, the transportation offense was added essentially to fill a gap left by the transaction provision in achieving that goal. To avoid U.S. law enforcement, money launderers "frequently use . . . offshore banks because of the difficulty in obtaining information to identify ownership interests and in acquiring ac-

count information from them." FBI Bulletin, *supra*, at 3; *see* 2007 National Money Laundering Strategy ("2007 Strategy") at 5, *available at* http://www.ice.gov/doclib/pi/financial/2007nmls.pdf (explaining problem of "criminal proceeds . . . leaving the United States as illicit bulk cash and reentering the country as seemingly legitimate funds")[12]; *see id.* ("Criminals facing barriers to money laundering at banks and [money service businesses] in the United States may attempt to smuggle cash to foreign financial institutions."); *see also, e.g., United States v. Kramer*, 73 F.3d 1067, 1070 & n.4 (11th Cir. 1996). Indeed, Congress recognized at the time of the statute's enactment that "the physical transportation of cash out of the country" is "the most common way in which money laundering is initiated." H.R. Rep. No. 99-855, at 15 (1986). The transportation provision effectively allows law enforcement to police these foreign money laundering transactions at the border. In *both* situations, however, Congress's sole concern

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[12] The 2007 Strategy paper describes some of the various ways smuggled cash is cleansed before being returned to the economy. *See* 2007 Strategy at 51 ("Bulk cash once it crosses the southwest border can take a number of routes, including: Individuals depositing the cash into Mexican banks or *casas de cambio* and then wiring it back into the United States; Complicit Mexican financial institutions repatriating the cash to the United States via cash couriers or armored cars, depositing the funds into the correspondent accounts; Smugglers moving the money on to Venezuela, Panama, Costa Rica, or other Latin American countries where it can be used to pay for goods – both legitimate and illicit – for the black market in Colombia; and, Individuals moving the funds to offshore jurisdictions with heightened bank secrecy protections.").

was with the ultimate act of sanitizing the proceeds of illegal activity to remove its illicit taint.

Numerous cases decided under the transportation prong illustrate the type of international transfers and transportations properly criminalized under this section. A good example of a genuine international money laundering scheme is described in *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996). In that case, drug proceeds were converted into cashiers' checks that were then "sent to a shell company in Liechtenstein" and "transferred through other entities in other countries to further disguise the origin of the money." *Id.* at 1070. A domestic corporation was created "to receive the money after it was 'cleaned' by these transfers," and to use some of the funds to build a casino and a marina. *Id.* "The end result of these transfers and construction projects was that tracing the drug proceeds directly was prevented by the deposit of the cashiers' checks in foreign banks. And tracing from the construction projects to their source of financing would reveal only that [the corporation] had received a 'loan' from a foreign entity protected by bank secrecy laws." *Id.* at 1070 n.4.[13]

Other cases reflect similar uses of offshore transfers to conceal or disguise the illegitimacy of illicit funds. *See United States v. Anderson*, 371 F.3d 606, 608, 610 (9th Cir. 2004) (money transferred to foreign bank account and then wired back to a "secret

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[13] The defendant's conviction in *Kramer* was reversed because he was only found to have participated in a transfer of funds from Switzerland to Luxembourg, and the statute is limited to transfers to or from the United States. *Id.* at 1072.

account" in the United States); *United States v. Awan*, 966 F.2d 1415, 1418-19 (11th Cir. 1992) (cash obtained from drug deals was deposited in the accounts of front businesses in the United States and then wired to investment accounts in Panama belonging to shelf corporations); *United States v. Neal*, 2003 WL 24472513, at *1 (E.D. Va. July 31, 2003) (defendant transferred illegal funds into an account in Lichtenstein and then into a shell company in the British Virgin Islands).

Several cases involving the physical transportation of cash across U.S. borders (like this case) likewise reflect the use of such transportation to initiate or complete a broader scheme designed to make illicit proceeds appear legitimate (unlike this case). One court described as "typical money laundering" a defendant's conduct of "secretly [carrying] the cash or proceeds [of his theft] to the Cayman Islands where he formed a corporation under a false name, planned on depositing the money in bank accounts under different names in amounts calculated to avoid reporting requirements," and was only thwarted when "the remainder of the funds was stolen by a person to whom he planned to give his money in an attempt to make it untraceable." *United States v. Bockius*, 228 F.3d 305, 313 (3d Cir. 2000); *see United States v. Castaneda-Cantu*, 20 F.3d 1325, 1329 (5th Cir. 1994) (defendants collected cash from drug trafficking and weapons smuggling in U.S., wired equal funds to bank account of person who supplied the "dirty" proceeds, smuggled the proceeds across the border to Mexico, and then "generated a fictitious receipt for the money," which "created a paper trail that made it appear as if the

money going into [the cash supplier's] account originated" from legal activities); *United States v. Beddow*, 957 F.2d 1330, 1333 (6th Cir. 1992) (defendant traveled to Brazil with third party who acted as a "front man" to exchange drug money, in cash and traveler's checks, for emeralds that were to be resold in the United States).

Although it was decided nominally under § 1956(a)(1), the Tenth Circuit's opinion in *Dimeck* also provides useful guidance because it specifically addresses the relevance of concealment during the physical transportation of drug proceeds. The court found the evidence in that case to be insufficient to show the requisite design to conceal, even though the defendant had physically concealed the money during transportation, because he had not sought to "confuse or mislead anyone as to the characteristics" of the funds. 24 F.3d at 1245-46. As the court explained:

> The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering. The existence of the money is, of course, concealed so that no explanation whatever need be offered to outsiders as to its attributes. The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises. Rather, the couriers' role was simply to deliver the funds . . . as illegal funds.

Id. at 1247 (citations omitted). Because the defendant had not concealed the funds for the purpose of "allowing these proceeds to enter into legitimate commerce," the money laundering conviction was reversed. *Id.* at 1246-47.

There is likewise no evidence – nor even any argument – here that Cuellar knew the transportation was designed to sanitize the money so that it could enter legitimate commerce. Accordingly, his conduct does not fit within the criminal offense Congress defined in § 1956(a)(2).

C. The History Of § 1956(a) Confirms That The Government Must Show That The Defendant Knew Of A Plan To Create The Appearance Of Legitimate Wealth

Section 1956(a)'s legislative history confirms that secretly transporting illicit money is not *ipso facto* money laundering absent proof that the defendant knew that one purpose of the transportation was to launder the money by making it appear legitimate. Indeed, the decision below not only is at odds with Congress's clear purpose in enacting the statute, but it actually imprints onto the statute a reading that Congress specifically rejected as overly broad.

1. As already explained, money laundering as a specific activity and problem was widely recognized and clearly understood by Congress at the time it enacted the Money Laundering Control Act. The Report of the President's Commission elaborated the problem in detail, and numerous witnesses at hearings confirmed the nature and harms of money laundering with acute specificity. The legislative record was unambiguous: Congress was concerned with the

processes by which criminal organizations gained access to their illegitimate wealth by removing any appearance of illegality from their proceeds, thereby underwriting and creating incentives for their illicit activities. *See supra*, at 18-20.

Despite the consensus built around a need to prohibit the cleansing of dirty money, the bills initially proposed were sharply criticized as being both too narrow and overly broad.[14] On the one hand, witnesses raised concerns that none of the proposals would prohibit the international transportation of illicit funds. The fear was that any statute that did not expressly prohibit the international transfer and transportation of illegal money would allow launderers to carry money to bank secrecy countries or overseas crime networks, thereby cleansing with impunity beyond the view and control of federal authorities. *See, e.g., Hearings*, at 302-12 (Tischler statement).

In order to fill that gap, the versions reported out of both the House and Senate committees included a second prong for the international transportation of illicit funds, which eventually became § 1956(a)(2). That provision reflected Congress's recognition that "the physical transportation of cash out of the coun-

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[14] For the text of the proposals initially introduced, see Money Laundering Act of 1985, H.R. 1367, 99th Cong. § 101(a) (1985) (Commission's proposal); Money Laundering and Related Crimes Act of 1985, H.R. 2786, 99th Cong. (1985); Money Laundering Crimes Act, S. 572, 99th Cong. (1985); Money Laundering and Related Crimes Act of 1985, S. 1335, 99th Cong. (1985); and Money Laundering Crimes and Disclosure Act of 1985, S. 1385, 99th Cong. (1985).

try" is "the most common way in which money laundering is initiated." H.R. Rep. No. 99-855, at 15 (1986). The transportation offense thus was designed to cover "situations in which money is *being laundered* by transferring it into the United States as well as those in which it is *being laundered* by transferring it out of the United States." S. Rep. No. 99-433, at 11 (1986) (emphases added). In other words, the transportation prong is designed to reach transportations that are necessary preludes to further laundering transactions.

On the other hand, members raised concerns that the proposals defined every transaction in illicit funds as money laundering, so long as the defendant knew the funds were dirty.[15] As the Chairman of the House Subcommittee on Crime observed, "an employee of General Electric who cashes his or her paycheck after receiving knowledge that General Electric has committed a major fraud of the U.S. Government" would be laundering money under those proposals because the employee would "know[] that the money was derived indirectly or in part from conduct which was illegal." *Hearings*, at 288 (statement of William J. Hughes, Chairman).

In order to refocus the statute on the *cleansing* of dirty funds, the Senate Judiciary Committee added the design-to-conceal element, as it currently exists, to both the transaction and transportation prongs. *See* S. Rep. No. 99-433, at 33-34. As the Senate Report explains, that element cabins the statute, nar-

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[15] Every proposal, except for H.R. 1474, also contained a separate promotion element, none of which required that the money represent the proceeds of unlawful activity.

rowing its focus to "the *core of money laundering* – transactions designed to conceal or disguise the nature, location source, ownership, or control of criminal proceeds, or to evade Federal or State cash reporting requirements." *Id.* at 10 (emphasis added).

As this history makes clear, § 1956(a) focuses squarely on the business of converting illicit money into seemingly legitimate forms – the lifeblood of organized crime. To accomplish that goal, § 1956(a)(1) prohibits the basic money laundering activity of conducting transactions in unlawful funds for the purpose of concealing the telltale characteristics of illicit property. Section 1956(a)(2) then fills a gap left by § 1956(a)(1) for international shipments of illegal cash which are the first, critical step in an international money laundering operation.

The statute having been expanded to reach both domestic and international money laundering, the design-to-conceal element limits its scope. The statute thus prohibits both transactions and transportations designed to make dirty money appear clean, but it does not create a general crime for all transactions or transportations involving illicit money, as initial proposals would have done.

By contrast, the reading adopted below would resurrect the overbroad proposals that Congress rejected. Virtually *every* transaction or transportation in illegal funds will involve some level of concealment and secrecy, lest the criminals expose their underlying criminal activity. *Cf. Grunewald v. United States*, 353 U.S. 391, 402 (1957) (defendants could not be convicted of conspiracy to conceal a conspiracy because "every conspiracy is by its very na-

ture secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world"). No functional distinction exists between a statute (such as those initially proposed and ultimately rejected) that prohibits any transaction or international transportation in illegal funds, and a statute (such as § 1956(a) under the Fifth Circuit's reading) that prohibits any transaction or international transportation in illegal funds that involves some level of secrecy and concealment.

The decision below thus is not simply contrary to § 1956(a)'s language and structure; it actually reverses an explicit choice by Congress to focus the statute on money laundering as traditionally understood.

D. The Bulk Cash Smuggling Statute Provides Further Proof That International Transportation Of Illicit Proceeds Alone Does Not Constitute Money Laundering

Further evidence that the money laundering statute does not reach the mere international transportation of illicit proceeds is provided by the bulk cash smuggling ("BCS") statute. Enacted in 2001 as part of the USA PATRIOT Act, that statute makes it a criminal offense punishable by up to five years in prison to knowingly smuggle more than $10,000 in "currency or other monetary instruments" into or out of the United States "with the intent to evade a currency reporting requirement." 31 U.S.C. § 5332(a)(1). In sharp contrast to § 1956, the BCS statute does not criminalize concealment of specified attributes of the money, but rather criminalizes the act of concealing the existence of the money. *Id.*

(statute targets anyone who "conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container").

The congressional findings written into the law enacting § 5332 make clear that the purpose of the statute was to target those who engage in precisely the activity for which Cuellar was convicted here. Congress determined that, as a result of the success of domestic anti-money laundering efforts, the smuggling of drug money out of the country in order to convert it into usable funds elsewhere was a growing problem. "In their effort to avoid using traditional financial institutions, drug dealers and other criminals are forced to move large quantities of currency in bulk form to and through the airports, border crossings, and other ports of entry where the currency can be smuggled out of the United States and placed in a foreign financial institution or sold on the black market." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. 107-56, Title III, § 371(a)(2), (3) 115 Stat. 272, 336-37 (2001) (codified at 31 U.S.C. § 5332). In addition, Congress found that "the movement of large sums of cash" by itself had become "one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes." *Id.*

While Congress thus recognized that the act of secretly transporting large sums of cash outside the United States was often *part* of a broader money laundering scheme, the problem Congress perceived

was that that mere act itself was not already covered by existing laws, including the Money Laundering Control Act. *See* H.R. Rep. No. 107-250(I), at 37 (2001) ("under current law, the person transporting the currency may not be guilty of any money laundering offense"). As Congress recognized, "the only law enforcement weapon against such smuggling" at the time was 31 U.S.C. § 5316, which makes it an offense to transport more than $10,000 into or out of the United States without reporting the transportation to the Customs Service. H.R. Rep. No. 107-250(I), at 36; S. Hrg. 107-641, at 74 (September 26, 2001) (statement of Rep. Roukema) ("The existing laws governing bulk cash smuggling are totally inadequate. Presently, the only law enforcement weapon against bulk cash smuggling is Section 5316 of Title 31, U.S. Code. . . . H.R. 2922 will give law enforcement authorities a critical tool in disrupting the channels used by terrorists to finance their activities in the United States."). Congress therefore enacted the BCS statute to fill the gap and "make the act of smuggling bulk cash itself a criminal offense." USA PATRIOT Act § 371(b); *see* 147 Cong. Rec. S109909-02, S11034 (2001) (statement of Sen. Levin) ("For the first time, bulk cash smuggling over U.S. borders will be a prosecutable crime, and suspect funds will be subject to forfeiture proceedings."); 2007 Strategy at 53 (noting that before enactment of the BCS statute, "an individual smuggling bulk quantities of cash was subject to criminal penalties and/or jail time or civil penalties" only for failing to satisfy the report-

ing requirements of § 5316 and 31 C.F.R. § 103.23) (footnotes omitted).[16]

Notably, Congress recognized that the bulk smuggling activity criminalized by the BCS statute involved precisely the kind of conduct for which Cuellar was prosecuted here. "Smugglers use all available means to transport the currency out of the country," the House Report observes, "from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad." H.R. Rep. No. 107-250(I) at 36. "The common elements in these [bulk cash smuggling] cases include the transportation of a large quantity of currency, bundled in street denominations and concealed in a vehicle, on an interstate or other major highway, by a person or persons who disclaim any knowledge of where the currency came from or where it is to be delivered." *Id.* at 37. The BCS law was plainly enacted to address the conduct at issue here; the Money Laundering Control Act just as plainly was not.

Cases prosecuted under the BCS statute confirm the use of that statute to target the mere transportation – but *not* the actual laundering – of funds. In *United States v. Salazar*, 223 F. App'x 424 (5th Cir. 2007), for example, the defendant was stopped while attempting to drive into Mexico, and the Border Patrol Inspector found a trap door in the gas tank, con-

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[16] Although § 5332 does not require proof that the smuggled money is the proceeds of a specified unlawful activity, the statute plainly targets illicit proceeds. *See* 2007 Strategy at 50 ("law enforcement believes much, if not most, of the seized cash does represent drug proceeds").

cealing $418,300 in U.S. currency inside a plastic bag bundled with rubber bands. *Id.* at 425-26. The defendant was charged with and convicted of violating 31 U.S.C. § 5332(a) as well as currency reporting requirements – but not the Money Laundering Control Act. Another case described the arrest of three couriers on a jetway who were trying to board a flight from New York to Pakistan carrying $515,583 in U.S. currency concealed, among other places, in soap and toothpaste boxes. *United States v. Khan*, 497 F.3d 204, 206 (2d Cir. 2007). They were convicted of bulk cash smuggling under 31 U.S.C. § 5332(a), as well as various offenses relating to their failure to report the money they were transporting under 31 U.S.C. § 5316 – but not money laundering.

Finally, the differences Congress perceived between the problem of money laundering and the problem of bulk cash smuggling are reflected in the grossly disparate penalties Congress authorized for the two offenses. A person convicted of transporting illicit funds for the purpose of laundering them is subject to up to twenty years imprisonment, whereas a person convicted only of secretly transporting the same funds is subject to a maximum five years imprisonment. *Compare* 18 U.S.C. § 1956(a) *with* 31 U.S.C. § 5332(b)(1). The much more severe laundering penalty is plainly intended to punish a *certain type* of international money smuggling – i.e., smuggling that the defendant knows to be part of a larger scheme of laundering the money, thereby to facilitate and incentivize continuing illegal activities. Where the Government cannot make that specific showing, the BCS statute fills the gap, criminalizing the mere act of transporting bulk cash without re-

porting it, since such acts *may* be part of a larger laundering plan, just as they may only be part of the process for making payments in a chain of underlying criminal activity. Either way, interpreting the Money Laundering Control Act broadly to criminalize essentially the same conduct already addressed by the BCS statute would quadruple the maximum punishment for an act that is already punishable under the BCS statute – contrary to the gap-filling purpose for which the BCS statute was enacted and to the integrated punishment scheme Congress established. Congress cannot be presumed to have intended such an incoherent and irrationally harsh result.

E. If Any Room For Doubt Remained, The Rule Of Lenity Compels A Narrow Construction Of The Statute

Petitioner submits that the scope of § 1956(a)(2) is sufficiently clear from its text, structure, purpose, and history. But even if there were any doubt about its clarity, reversal would be compelled by the rule of lenity, "which demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see Ratzlaf v. United States*, 510 U.S. 135, 147 (1994). Put differently, when a criminal statute is capable of more than one reasonable construction, the statute must be given "the more narrow reading of which it is susceptible." *James v. United States*, 127 S. Ct. 1586, 1603 (2007) (Scalia, J., dissenting); *see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule of lenity thus shifts

the burden to the Government not only to show that its broader construction is reasonable, but also to exclude any reasonable possibility that the narrower construction reflects Congress's actual purpose. That is, where the "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court "appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). Application of the rule of lenity is particularly appropriate where, as here, the statute at issue is vulnerable to prosecutorial overreaching. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988) (rule of lenity is intended "to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts").

As already shown, the text, structure, and history all fully confirm Congress's intent to criminalize only those international transportations of illicit funds that are designed to remove the taint of evident criminality from the funds. There certainly is no basis in those interpretive sources for concluding that either the Fifth Circuit's or the Government's position is unambiguously correct. To the contrary, both positions are quite incorrect, as the next section demonstrates. At the very most the Government can hope only to sow some ambiguity in the language of § 1956(a)(2), but that ambiguity must be resolved against the Government and in favor of Cuellar's position here.

II. THE COUNTER-THEORIES ESPOUSED BY THE FIFTH CIRCUIT AND PROPOSED BY THE GOVERNMENT ARE WITHOUT MERIT

The Fifth Circuit and the Government endorse conflicting theories of what the prosecution must prove to sustain a money laundering conviction under § 1956(a)(2). Neither is compelled by the text of § 1956(a)(2), and neither is consistent with the purpose Congress sought to achieve in enacting § 1956(a)(2).

A. The Fifth Circuit's Concealment-During-Transport-Only Theory Is Incorrect, As The Government Acknowledges

The Fifth Circuit held that "simply taking steps to hide illicit funds is sufficient to prove concealment" for international money laundering (Pet. App. 13a), and it expressly rejected the theory that § 1956(a)(2) "requir[es] proof of a plan to conceal the funds once they reach the ultimate destination outside the country" (*id.* at 10a); *see id.* at 16a (concealment may be accomplished simply by "successfully transport[ing]" proceeds to Mexico).

The Fifth Circuit's construction appears to rest on a simple misunderstanding of the word "design." *See* 18 U.S.C. § 1956(a)(2)(B)(i) (transportation must be "designed in whole or in part – (i) to conceal or disguise" certain attributes of the proceeds). As that court construes the word in this context, it essentially means *structure*, as in the "design" of a house. Because Cuellar's method of transportation was structured in such a way as to conceal the money – i.e., he drove a car reconfigured to keep the funds

hidden – the court concluded that he had "designed" the transportation to "conceal" the money.

It is clear, however, that Congress did not intend to use the word "design" in this static sense. An at least equally common understanding of "design" is *purpose* or *plan*, as in "[t]he money laundering statute was designed to punish those drug dealers who . . . attempt[] to legitimize their proceeds." *Dimeck*, 24 F.3d at 1247; *see American Heritage Dictionary of the English Language* 491-92 (4th ed. 2000) ("to have as a goal or purpose; intend"); *Webster's Third New International Dictionary of the English Language, Unabridged* 611 (1993) ("to plan or have in mind as a purpose: intend, purpose, contemplate"). Even the Government agrees that this is the sense in which "design" is used in § 1956(a). U.S. Br. Opp. 11 (money laundering "statute makes it an offense to transport money *for the purpose of* concealing or disguising it" (emphasis added)).

The Fifth Circuit's view that § 1956 criminalizes the mere act of concealing illicit funds during transport cannot be squared with the text, purpose, or history of § 1956(a). None of those indicators suggests Congress was concerned only with the hiding of cash during transport – to the contrary, that distinct concern was addressed later, by the BCS statute. *See* Part I.D, *supra*. The Fifth Circuit's construction does not even address the basic textual requirement that the transportation be designed to conceal certain attributes of the money, rather than the money itself. That is, the simple concealment of the existence of monetary instruments while in transit may facilitate the border-crossing, but it does not conceal any of the attributes Congress enumerated in the

money laundering statute. The proceeds are just as dirty upon arrival as they were at the start of their journey; they have only been physically relocated. *See Johnson*, 440 F.3d at 1291 (proceeds must be "better concealed or concealable after the [transportation] than before"); Pet. App. 15a. That relocation may satisfy the "international transportation" requirement of 1956(a)(2), but absent some plan to further conceal the money upon arrival it does not establish the "design to conceal" element of the statute.

The Fifth Circuit's reading also ignores the intent requirement specifically inserted by Congress to cabin the reach of the statute and thus prevent misuse by prosecutors. *See supra*, at 30-31. To conclude that secretive international transportation of illicit funds is money laundering is tantamount to saying that *all* international transportation of illicit funds is money laundering, since *everybody* who travels with cash (particularly illicit cash) conceals it some way, and those who are transporting large sums are likely to take extra precautions.

As the dissent below put it, "[t]here is a difference between concealing something to transport it, and transporting something to conceal it." Pet. App. 24a. The Fifth Circuit's view would criminalize the former, but the statute criminalizes only the latter.

B. The Government's Ultimate-Purpose-To-Conceal-Only Theory Is Also Incorrect

Although it concedes that a money laundering conviction requires proof that the illicit funds were transported for the purpose of concealing them, the Government's understanding and application of that

test reveals it to be the functional equivalent of the Fifth Circuit's flawed construction.

According to the Government, the transportation need only be designed to hide the funds at the end of the journey, not to create the appearance of illegitimacy. U.S. Br. Opp. 11. But the existence of that ultimate purpose to hide the funds at the destination, the Government contends, may be inferred from the mere hiding of funds en route, so long as the concealment was "elaborate" and not "minimal." *Id.* at 17; *see id.* ("degree of concealment" must be "significant"); *id.* at 11 ("the more convoluted the transaction, the easier it is to infer a design to conceal or disguise").

There are at least three problems with this formulation. First, nothing in the text of § 1956(a) supports an added "substantial or elaborate concealment" element. The statute refers only to a "design[]" to "conceal or disguise." Petitioner submits that in context "conceal or disguise" refers to concealing or disguising the *illegitimacy* of the funds, but there is no basis in the statute for understanding "conceal" to mean "substantially conceal."

Second, the Government provides no basis on which juries can distinguish minimal acts of concealment (not unlawful) from substantial acts of concealment (unlawful). Whether hidden in secret compartments, glove compartments, suitcases, boxes, money belts or wallets, no smart traveler keeps significant sums of money in plain view. In other words, hiding money is *how people travel with money*. And the more cash they are carrying, the more careful they are likely to be to protect it. The

blurry, unwritten line between minimal and substantial concealment gives judges and juries far too little guidance in identifying the acts worthy of lengthy criminal money laundering sentences. For the same reason, it also gives prosecutors far too much power to secure plea bargains for substantial prison time for what may not be money laundering acts at all.

Third, there is no basis for the Government's assumption that substantial concealment in transit proves that the transportation was undertaken for the purpose of concealment. Illicit funds are often carried in bulk amounts, and couriers would rarely be likely to carry such funds without some effort to secure them substantially, both from authorities and from other criminals. It simply is not rational to infer a further purpose of concealment at the destination from the mere fact that the money was hidden during transportation. Moreover, there are any number of reasons why one might secretly transport illicit money across the border that have nothing to do with concealment as an ultimate purpose. The money could be used to buy contraband, to hire prostitutes, to gamble, to pay organized crime protection money, to finance a vacation, or otherwise to be spent for personal benefit. In the case of drug money, the transport may be to purchase drugs or repay a drug supplier. Those purposes may be undesirable or unlawful for other reasons, but they do not evidence a "design to conceal" under any plausible definition.

The Government's theory, in short, gives juries little or no basis for distinguishing those acts of secretly transporting illicit funds internationally that

are prohibited by § 1956(a)(2) from similar acts that are not prohibited by § 1956(a)(2). It thus effectively expands the statute to impose lengthy terms of imprisonment for *all* acts of secretly transporting illicit funds internationally – *regardless of purpose*. That proposition cannot be reconciled with the text, function, or history of the statute, or with the separate existence of the BCS statute, which was enacted to address precisely those acts that cannot be proved to be part of a money laundering scheme.

III. BECAUSE THE GOVERNMENT OFFERED NO EVIDENCE OF A PURPOSE TO CONCEAL BY ANY DEFINITION, CUELLAR'S CONVICTION CANNOT STAND

Even if the statute could be read as allowing a conviction when the ultimate purpose of the transport is merely to hide the money in its final destination – and not necessarily to convert it into seemingly legitimate funds – Cuellar's conviction cannot stand because there was no evidence of either purpose here.

As the Fifth Circuit's opinion makes clear, the record evidence established nothing more than acts of concealment for transportation, not an act of transportation to conceal. The en banc majority pointed to four facts supporting the design-to-conceal element: (1) that Cuellar took steps to conceal marijuana odor on the cash; (2) the cash was wrapped in duct tape and covered in plastic bags and carpet; (3) the cash was placed in a hidden compartment; and (4) Cuellar had little information about the owner of the cash (other than the most revealing fact, i.e., his name). Pet. App. 11a. The first three certainly show

that the cash was concealed en route. They may also support an inference that the funds were illicit in some way. The fourth shows at most that the owner did not want to be associated with the funds and thus perhaps further supports the inference of illegitimacy. But even taken collectively, *nothing* about those facts demonstrates beyond a reasonable doubt that Cuellar knew the transportation was designed to conceal the cash upon its arrival in Mexico.[17]

Indeed, if any particular inference about the purpose of the transportation is reasonable, it is that the money was not supposed to be concealed, but *spent* in the furtherance of the underlying criminal activity. The Government's expert testified that Cuellar's behavior was that of a drug smuggling courier. J.A. 62-63, 65. In such an operation, he testified, the money hidden in a vehicle is intended to pay the drug supplier to whom it is owed. J.A. 65. In other words, by the Government's own account, a likely purpose of transporting the illicit funds was so that they could be spent as part of the underlying drug smuggling operation – not secreted away uselessly in Mexico. There most certainly was no evidence that the transportation was designed to cleanse the money of its criminal taint – if used to purchase drugs or repay a supplier in Mexico, the money would be (and would appear) just as illicit as the day it was bundled into Cuellar's car.

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[17] To the extent these facts might demonstrate concealment of certain attributes of the proceeds *during* transportation, they still say nothing about the ultimate purpose of that transportation – i.e., that the transportation was designed to conceal the proceeds at the end of the journey.

Because there was no permissible basis upon which the jury could find beyond a reasonable doubt that the transportation of illicit funds was designed for *any* purpose prohibited by § 1956(a), Cuellar's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, and remand for the district court to enter a judgment of acquittal.

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HUMBERTO FIDEL REGALADO CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner's attempt to transport more than $80,000 in drug proceeds, hidden in a secret compartment of a car, from the United States to Mexico sufficiently established that the transportation was "designed," in whole or in part, to "conceal or disguise" the nature, location, source, ownership, or control of those illegal proceeds within the meaning of 18 U.S.C. 1956(a)(2)(B)(i), absent proof that the transportation was designed to create the appearance of legitimate wealth.

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U.S. Const. Amend. VII (Excessive Fines Clause) 35
Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 19
Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* 32
18 U.S.C. 1961(1) 3
18 U.S.C. 1961(1)(A) (Supp. V 2005) 3
18 U.S.C. 1961(1)(D) (Supp. V 2005) 3
Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 371, 115 Stat. 336 35
§ 371(a)(3), 115 Stat. 337 38
§ 371(b), 115 Stat. 337 38
18 U.S.C. 1956 (2000 & Supp. V 2005) ..... *passim*, 1a
18 U.S.C. 1956(a) 13, 15, 18, 23, 1a
18 U.S.C. 1956(a)(1)(A)(i) 23, 31
18 U.S.C. 1956(a)(1)(B)(i) ..... *passim*, 1a
18 U.S.C. 1956(a)(2) ..... *passim*, 1a
18 U.S.C. 1956(a)(2)(A) 23, 2a
18 U.S.C. 1956(a)(2)(B)(i) ..... *passim*, 2a
18 U.S.C. 1956(a)(2)(B)(ii) 36, 2a

Statutes—Continued: Page

18 U.S.C. 1956(c) (2000 & Supp. V 2005) 14, 5a
18 U.S.C. 1956(c)(3) 18, 6a
18 U.S.C. 1956(c)(7)(A) 3, 7a
18 U.S.C. 1957 ..... 30, 15a
31 U.S.C. 5316 35
31 U.S.C. 5332 (Supp. V. 2005) 11, 34, 35, 17a
31 U.S.C. 5340(2) 22, 23

Miscellaneous:

American Heritage Dictionary of the English Language:
(3d ed. 1992) 14
(4th ed. 2000) 20
Exec. Order No. 12,435, 3 C.F.R. 214 (1983) 17
H.R. Rep. No. 250, 107th Cong., 1st Sess. Pt. 1 (2001) .. 37
Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) 27, 28
Oxford Dictionary of the English Language (2d ed. 1989) 15
President's Comm'n on Organized Crime:
Organized Crime and Money Laundering, Record of Hearing II, March 14, 1984, New York, New York (1984) 25
Cash Connection: Organized Crime, Financial Institutions, and Money Laundering, Interim Report to the President and the Attorney General (1984) 17, 25, 26

Miscellaneous—Continued: Page

Random House Dictionary of the English Language Unabridged (2d ed. 1987) 14
S. 572, 99th Cong., 1st Sess. (1985) 26, 27
S. 1335, 99th Cong., 1st Sess. (1985) 27
S. 1385, 99th Cong., 1st Sess. (1985) 27
S. 2683, 99th Cong., 1st Sess. (1986) 29
S. Rep. No. 433, 99th Cong., 2d. Sess. (1986) ..... *passim*
Webster's New International Dictionary Second Edition Unabridged (1958) 14, 15
Webster's Third New International Dictionary of the English Language Unabridged (1993) 14, 15, 20
B. Frederic Williams, Jr. & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* (1999) 22, 23
White Collar Crime (Money Laundering): Hearings on Oversight of the Problem of White Collar Crime Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. Pt. 2 (1986) 28, 29

In the Supreme Court of the United States

No. 06-1456

HUMBERTO FIDEL REGALADO CUELLAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 478 F.3d 282. A previous, now-vacated opinion of the court of appeals (Pet. App. 45a-56a) is reported at 441 F.3d 329.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2007. The petition for a writ of certiorari was filed on May 3, 2007. The petition for a writ of certiorari was granted on October 15, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

After a jury trial, petitioner was convicted of attempting to transport the proceeds of drug trafficking from the United States to Mexico with knowledge that the funds were derived from crime and that the transportation was "designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control" of the proceeds, in violation of 18 U.S.C. 1956(a)(2)(B)(i). A divided panel of the court of appeals reversed petitioner's conviction, holding that the government failed to prove that his transportation was designed to create the appearance of legitimate wealth. Pet. App. 51a-53a. On rehearing, the en banc court affirmed petitioner's conviction, rejecting petitioner's contention that the statute requires proof of conduct that creates the appearance of legitimate wealth and holding that the evidence proved every element of the offense. *Id.* at 11a-12a. This Court granted certiorari.

1. Section 1956(a)(2)(B)(i) of Title 18 makes it a crime, punishable by up to 20 years' imprisonment, to

> transport[], transmit[], or transfer[], or attempt[] to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> * * * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such

> transportation, transmission, or transfer is designed in whole or in part—
>
> > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity[.]

18 U.S.C. 1956(a)(2)(B)(i). Section 1956(c)(7)(A) defines "specified unlawful activity" to include the racketeering crimes enumerated in 18 U.S.C. 1961(1), which in turn include state and federal drug trafficking offenses. See 18 U.S.C. 1961(1)(A) and (D) (Supp. V 2005).

2. The government's evidence at trial showed that on the evening of July 14, 2004, petitioner was traveling south toward Mexico in a Volkswagen Beetle on United States Route 277. Route 277 ends at Del Rio, Texas, which is across the border from Acuna, Mexico. Deputy Kevin Herbert noticed that petitioner's car was traveling only 40 miles per hour in a 70 mile-per-hour zone and also observed the car veer onto the shoulder of the road. Deputy Herbert suspected that the driver might be intoxicated. Deputy Herbert pulled behind petitioner's car and saw that the car displayed no registration or license plate. Deputy Herbert stopped petitioner two miles south of Eldorado, Texas, about 114 miles from the Mexican border. J.A. 13-15; Gov't Supp. C.A. Br. on Reh'g 2.

Petitioner spoke no English. Deputy Herbert tried to determine whether petitioner had a license and insurance. Petitioner provided a Mexican license and some paperwork from the glove box, but no insurance. On his own, petitioner exited the car and lifted the trunk lid at the front of the car. Nothing was visible in the trunk except the gas tank and spare tire. J.A. 15-17, 20-21, 39.

Trooper Danny Nunez arrived and asked petitioner some questions in Spanish. Petitioner said he had no insurance, and he avoided eye contact and seemed nervous. Petitioner indicated he had been on a road trip for three days looking for a vehicle. Trooper Nunez noticed a large bulge in petitioner's front pocket and asked what it was; petitioner said it was money. Trooper Nunez asked if he could see the money, and petitioner removed the rolled-up cash from his pocket. Both Trooper Nunez and Deputy Herbert detected the odor of marijuana on the money. Petitioner had $2275 in his wallet and pocket. J.A. 24-25, 27, 36-38, 44, 50-51.

Trooper Nunez obtained petitioner's consent to search the vehicle. The officers found no personal items in the car, but did find bus tickets in petitioner's name that showed that petitioner had traveled a lengthy route through Texas by bus over the previous day and night.[1] The officers also looked under the hood and noticed that one of the two clamps on the gas tank of the car was backwards and both clamps had fresh tool marks on them. The fender walls had drill marks and mud was splashed in unusual places on the car, as if it had been applied with an acoustic gun. Trooper Nunez had observed similar techniques used to cover up work done on a vehicle. Trooper Nunez noticed that the carpet in petitioner's car appeared newer than the rest of the vehicle's interior. Animal hair was concentrated in the area behind the back seat. When asked about the animal hair,

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[1] Petitioner first traveled eastward from the border (from Del Rio to Uvalde to San Antonio). Overnight, petitioner traveled north (from San Antonio to Big Spring, Lubbock, Tulia, and Amarillo). Petitioner then traveled south to arrive at the location of the traffic stop, covering nearly 1000 miles in less than two days. J.A. 22-24, 33-34, 48-49; Gov't Supp. C.A. Br. on Reh'g 3.

petitioner said that he had carried goats to Mexico in the car. Trooper Nunez was skeptical, because the hair was concentrated in only one area. J.A. 18, 22, 25, 39-45.

Deputy Jason Chatham arrived with a certified narcotics-detection dog. During a search around the vehicle, the dog alerted to the passenger's side door. Inside the car, the dog alerted to the driver's seat and the back seat. The officers put the currency from petitioner's pocket in the glove box. The dog searched the car again five minutes later and alerted to the glove box in addition to the previous locations. J.A. 55-56.

In the small carpeted cargo area behind the back seat, Deputy Chatham noticed two wooden speaker boxes and a concentration of white animal hair. Deputy Chatham knew that individuals often used animal hair to try to distract drug-detection dogs. Deputy Chatham also noticed two new upholstery tabs holding the carpeting in place and signs of metal welding. Deputy Chatham removed the tabs, pulled back the carpet, and found that a cut-out square of the floorboard was being held in place by screws. Deputy Chatham shined his flashlight under a corner of the cut-out floorboard and discovered a false compartment that contained seven duct-tape bundles. J.A. 28, 57-59.

The bundles contained more than $80,000 in United States currency of all denominations. Each bundle was wrapped in a plastic bag and duct tape and was marked with a dollar amount that accurately reflected the money inside the bundle. In the glove box, officers discovered a Sharpie marker and a Phillips-head screwdriver that matched the screws that secured the hidden compartment. J.A. 29-31.

Petitioner was arrested. At the police station, petitioner asked to call his family in Mexico and said that if

"the vehicle wasn't in Mexico by midnight, * * * his family would be floating down the river." During questioning, petitioner said he had picked up the Volkswagen in a Walmart parking lot and received money from a man he did not know to drive the car to Mexico. At trial, petitioner testified that he previously owned the car, had sold it to a "Mr. Morcia," and was driving the car to Mexico for repairs. J.A. 49-50; Gov't Supp. C.A. Br. on Reh'g 8-10.

An expert in drug trafficking organizations explained that the largest problem of any drug organization is "what to do with their cash." Cash sales of drugs generate a "huge * * * amount of paper," and drug organizations cannot deposit currency in the bank without "doing some paperwork that they don't want to do." Drug organizations, the expert explained, therefore hire drivers to take the money "in secret back down to Mexico," often using hidden compartments in cars. The money is usually packaged in cellophane or duct tape so that it is easy to handle and the amount is known. Materials such as plastic and duct tape also can contain the scent of marijuana, which will "permeate" money that has been stored with the drugs. The expert explained that a driver often does not load the car, see the car loaded, or "know anything more than what he needs to drive that money into Mexico," which limits the information he can provide if he is stopped by law enforcement. The drivers generally do know that they are transporting drugs or money, and the vehicle often is registered to the driver to negate suspicion in the event of a traffic stop. The expert testified that the Mexican economy is largely cash-based and that American dollars are widely accepted in the border towns. J.A. 63-71.

3. The jury found petitioner guilty of violating 18 U.S.C. 1956(a)(2)(B)(i). The district court sentenced him to 78 months of imprisonment, to be followed by three years of supervised release. J.A. 2-4.

4. A divided panel of the court of appeals reversed petitioner's conviction. Pet. App. 45a-56a. The majority concluded that the government had proved beyond a reasonable doubt that the cash secreted in petitioner's car was illegal drug proceeds, that petitioner knew it was illegal drug proceeds, and that petitioner was attempting to transport the money to Mexico. *Id.* at 49a. But the majority held that the government failed to show that petitioner's transportation of the money "was designed in whole or in part to conceal or disguise its nature, location, source, ownership or control." *Id.* at 49a-50a. The majority noted that petitioner "was not trying to create the appearance of legitimate wealth by smuggling drug money across the border." *Id.* at 52a (internal quotation marks and citation omitted). In the majority's view, "[t]aking hidden cash to Mexico is not money laundering unless some further design to conceal can be proved. The statute would prohibit taking drug money to Mexico for the purpose of concealing the fact that it is drug money. The statute does not outlaw concealing drug money from the police for the purpose of taking it to Mexico." *Id.* at 51a.

In a dissent, Judge Davis concluded that the government's proof that "the defendant knowingly concealed the [drug proceeds] in the vehicle and intended to deliver the funds to Mexico" established the concealment element of money laundering. Pet. App. 53a.

5. The court of appeals granted the government's petition for rehearing en banc and affirmed petitioner's conviction. Pet. App. 1a-44a. The court concluded that

"[o]n several bases, * * * the government adequately established the concealment prong of the statute, i.e.[,] that [petitioner's] transportation of the funds was designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the proceeds." *Id.* at 10a-11a. The court held, first, that the evidence established that the transportation of the drug proceeds "was designed to conceal the nature of the proceeds." *Id.* at 11a. The court noted that the odor of the proceeds "associated [them] with illicit drug activity" and that "aspects of the transportation"—particularly the manner in which the money was wrapped and concealed for transport and the use of animal hair to distract drug detection dogs—"were designed to conceal or disguise the nature of the cash as drug proceeds." *Ibid.* The court held that those same facts also supported the conclusion that "the transportation was designed to conceal the location of the cash." *Ibid.*

Second, the court held that the evidence demonstrated that "the transportation was designed to conceal or disguise the source, ownership or control of the cash." Pet. App. 11a. The court noted that petitioner had little information about the owner of the cash and that the "transportation plan allowed the owner to put the cash in the hands of an intermediary or third party, which made it difficult for authorities to determine who actually owned or controlled the cash." *Ibid.* That conclusion, the court explained, was further supported by the expert testimony concerning drug dealers' practice of "insulat[ing] themselves" from couriers and others in the drug organization "to avoid revealing their identity." *Id.* at 11a-12a.

The en banc majority rejected petitioner's contention that the money laundering statute "requires proof that

the defendant's acts created the appearance of legitimate wealth or converted dirty money into clean." Pet. App. 12a. The court reasoned that "creating the appearance of legitimate wealth is one way of concealing illicit funds, [but] it is not the only way concealment can be established." *Ibid.* The court observed that "Congress chose the broad, unqualified word 'conceal'" and that "[i]t makes no sense to say that Congress only intended to prohibit concealment that is accomplished in a certain way." *Ibid.*

Three judges dissented. Pet. App. 22a-44a. The dissent distinguished between "concealing money to transport it, and transporting money to conceal its location" and concluded that only the latter conduct is encompassed by the "definition of money laundering, which is to make dirty money difficult to trace by concealing its illegality." *Id.* at 27a. In the dissent's view, the government failed to satisfy the concealment element because it did not prove "what [petitioner] planned to do with the money once he reached his destination" and did not establish "a design to create the appearance of legitimate wealth." *Id.* at 25a, 38a.

SUMMARY OF ARGUMENT

The money laundering statute prohibits, among other things, the cross-border transportation of illegal proceeds when that transportation is "designed to conceal or disguise" any one of five attributes of the proceeds—their nature, location, source, ownership, or control. The statute does not limit the "concealment or disguise" element to any one means or method, nor does it require proof of a design to create an "appearance of legitimate wealth," words that appear nowhere in the statute's text.

Petitioner's conduct fell squarely within the terms of the statute as written, and his conviction should be affirmed.

A. The money laundering statute contains clearly defined elements prohibiting the transportation or attempted transportation of certain criminally derived proceeds when the defendant has knowledge of two things: that the funds are proceeds of some unlawful activity and that the transportation is designed to conceal or disguise one of the five listed attributes of the proceeds. Petitioner's argument that the transportation must be designed to produce an "appearance of legitimate wealth" would engraft language onto the statute that Congress did not write. That phrase is not in the statute and cannot be inferred from the statutory terms. The title of the statute— "Laundering of monetary instruments"—cannot limit the plain meaning of the text. Indeed, it is indisputable that the operative provisions of the money laundering statute prohibit some conduct that is not "traditional" money laundering as petitioner would define it. Even if the title of the statute had relevance, it could not be read to limit the scope of only some of the provisions within it.

B. The legislative history of the money laundering statute reinforces the conclusion that the statute contains no "appearance of legitimate wealth" limitation. That history demonstrates that Congress did not view "money laundering" as being limited to a "traditional" or "classic" form of the offense. Congress viewed "money laundering" as encompassing many methods and motives for concealing or disguising the proceeds of crime, including the surreptitious transportation of illegal proceeds across the United States border. Congress was concerned with a variety of means of disguising or concealing illegitimate funds. Disguising illegitimate funds

as legitimate wealth is just one means to that end, and there is no reason to think that Congress intended to address only that one means. To the contrary, Congress enacted the money laundering statute to criminalize a spectrum of conduct that impairs the ability of law enforcement to find and recover the illegal proceeds of certain crimes. Petitioner's conduct falls squarely within that spectrum.

C. The bulk cash smuggling statute, 31 U.S.C. 5332 (Supp. V 2005), does not support the argument that money laundering requires an "appearance of legitimate wealth." The bulk cash smuggling statute covers a distinct and less culpable category of conduct and extends to large sums of cash that are wholly legitimate. Bulk cash smuggling requires proof that a defendant concealed more than $10,000 during a border crossing and intended to evade a currency reporting requirement. It does not purport to deal with cases where the government can show that the proceeds were illegal and the defendant knew that fact. When a defendant surreptitiously transports or attempts to transport illegal proceeds across the border knowing of their illegal character, money laundering is the appropriate charge.

D. The rule of lenity has no applicability to this case. The text of the money laundering statute "does not demonstrate ambiguity. It demonstrates breadth." *Sedima, SPRL* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotation marks and citation omitted). Nor is there any reason to believe that the statute poses any danger of criminalizing apparently innocent conduct. The requirement that a defendant know that he is concealing or disguising criminally derived proceeds ensures that no blameless conduct is even possibly reached by the statute.

E. Petitioner's conduct fell squarely within the coverage of the money laundering statute. Petitioner attempted to transport more than $80,000 in drug trafficking proceeds to Mexico in a secret compartment of a car, knowing of the illegal origins of the funds. The evidence established that petitioner's transportation of the illegal proceeds was designed, at least in part, to conceal or disguise the "location" and "nature" of the funds by moving them to Mexico without detection by law enforcement. The evidence also established that the transportation of the funds was designed, at least in part, to conceal or disguise the "source," "ownership," and "control" of the proceeds by shielding the identity of the party for whom petitioner transported the funds.

ARGUMENT

PETITIONER'S ATTEMPTED CROSS-BORDER TRANSPORTATION OF ILLEGAL PROCEEDS VIOLATES THE FEDERAL MONEY LAUNDERING STATUTE, REGARDLESS OF WHETHER IT WAS DESIGNED TO CREATE AN APPEARANCE OF LEGITIMATE WEALTH

The money laundering statute under which petitioner was charged is clearly written to reach the conduct in which petitioner engaged, *i.e.*, seeking to transport illegal proceeds out of the United States knowing of their illegal character and knowing of the design of the transportation to hide the funds themselves, their illegal origins, their ownership, and their control. Petitioner argues that "concealment" money laundering encompasses only conduct that "creates the appearance of legitimate wealth." That phrase, however, does not appear in the statute, and none of petitioner's arguments justifies importing such an extra-textual limitation. See *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) (courts should

not "read * * * absent word[s] into [a] statute"). Because a jury could reasonably find that petitioner's attempted transportation to Mexico of drug proceeds hidden in a secret compartment of a car was designed to conceal or disguise at least one of the characteristics of the funds listed in the statute, the judgment should be affirmed.

A. The Text Of The Statute Does Not Require A Design To Create The Appearance Of Legitimate Wealth

Petitioner and amicus principally argue (Br. 11; National Association of Criminal Defense Lawyers Amicus Br. in Support of Pet. 2) that "only concealment that creates the appearance of legitimate wealth" is covered by 18 U.S.C. 1956 (2000 & Supp. V 2005) and that, therefore, the "[m]ere[] hiding" of drug proceeds while crossing the United States border is not money laundering. That argument is contrary to the statutory text and relies on an incomplete reading of the legislative history. While "traditional" money laundering—complex financial transactions intended to make illegal money look legitimate—was a central concern of Congress in enacting Section 1956, it was not Congress's sole concern. The statute explicitly covers, and was intended to cover, a wide range of conduct that impairs the ability of law enforcement to find and recover the proceeds of crime.

1. Section 1956(a) prohibits, among other things, transactions in or the cross-border transportation of the proceeds of certain crimes (that is, the proceeds of "specified unlawful activity," including drug trafficking) if the transaction or transportation "is designed in whole or in part * * * to conceal or disguise the nature, the location, the source, the ownership, or the control of" the funds. 18 U.S.C. 1956(a)(2)(B)(i). A violation occurs

when a transaction or cross-border transportation is designed either to conceal "*or*" to disguise any one of the listed attributes of illegal proceeds. The phrase "in whole or in part" indicates that the "concealment" or "disguising" of a listed attribute need not be the sole design of the transaction or cross-border transportation. The government must prove that the defendant knew that the proceeds were derived from crime (although the defendant need not know that the underlying crime was "specified unlawful activity") and that the transaction or transportation was designed to conceal or disguise the proceeds in the relevant sense.

Congress did not define the phrase "designed in whole or in part * * * to conceal or disguise," although it did define some other statutory terms. See 18 U.S.C. 1956(c) (2000 & Supp. V 2005). When not otherwise defined, "statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 643 (2006). The ordinary and primary meaning of the verb "design" is "to conceive and plan out in the mind." *Webster's Third New International Dictionary of the English Language Unabridged* 611 (1993) (*Webster's Third*). See *Webster's New International Dictionary Second Edition Unabridged* 707 (1958) (*Webster's Second*) ("To plan mentally."); *The American Heritage Dictionary of the English Language* 506 (3d ed. 1992) (*American Heritage*) ("to conceive or fashion in the mind; invent"). "Conceal" ordinarily means: "to hide; withdraw or remove from observation; cover or keep from sight." *The Random House Dictionary of the English Language Unabridged* 422 (2d ed. 1987). See *Webster's Third* 469 ("To place out of sight: withdraw from being observed: shield from vision or notice."); *Webster's Second* 551 ("To hide or withdraw from

observation."); *The Oxford Dictionary of the English Language* 646 (2d ed. 1989) ("To keep from the knowledge or observation of others, refrain from disclosing or divulging, keep close or secret."). "Disguise" has as its primary meaning: to "change the customary dress or appearance of: furnish with a false appearance or an assumed identity." *Webster's Third* 649; accord *Webster's Second* 747.

2. Petitioner argues that an "appearance of legitimate wealth" requirement is implicit in the "conceal or disguise" provisions of 18 U.S.C. 1956(a). Petitioner reasons that the "attributes" of illegal proceeds listed in those provisions are ones "that would reveal [the proceeds] to be illicit." Pet. Br. 20-21. Therefore, petitioner concludes, any conduct that "conceal[s]" or "disguis[es]" any of those attributes "will necessarily have the effect of making the funds appear to be legitimate." *Id.* at 21. That argument is unsound.

In the first place, the object of money laundering is accomplished by concealing or disguising the illegitimate nature of illegal proceeds. While the classic way to conceal or disguise such illegitimate funds is to make "the funds appear to be legitimate," it is not the only way. An equally effective way to "disguise" illegitimate funds is to get them out of the country altogether, in which case they will not betray the illicit nature of an unlawful enterprise. "Concealing" those funds by moving them abroad has the same effect. Section 1956(a) expressly covers this stratagem for concealing or disguising illegitimate funds.

Moreover, petitioner is not correct when he contends that each of the "attributes" of illegal proceeds listed in the statute, if exposed, "would reveal" the illegitimacy of the funds. Merely revealing the "location" of funds in a

bank account, a safe deposit box, or in the Cayman Islands, for instance, need not also reveal that the funds are criminally derived. Likewise, revealing the "ownership" or "control" of funds need not expose their illegitimacy. Individuals engaged in crime can have legally-derived assets also. The same is true with respect to the "source" of proceeds: revealing from whom the proceeds came would not necessarily reveal their illegal character. Only revelation of the "nature" of the funds would necessarily disclose their origins in illegal activity. If Congress intended to limit the statute to the concealment or disguising of attributes that "would reveal [illegal proceeds] to be illicit," it would have stopped with "nature." Pet. Br. 21-22.

Petitioner also is incorrect that any transaction or transportation designed to conceal or disguise one of the listed attributes necessarily will "mak[e] the funds appear to be legitimate." Pet. Br. 21. A transaction or transportation designed to make illicit funds appear legitimate will necessarily be designed to disguise their "nature." A transaction that disguises another attribute, such as the "source," "ownership," or "control" of illegal proceeds, may make detection less likely without making the funds appear legitimate at all. A drug kingpin who transfers illegal proceeds to the account of his confederate to obscure his role in the crime has not made the funds appear legitimate, but he has "disguised" his "control" of them.

Moreover, "conceal" and "disguise" are different verbs with distinct meanings. A design to "conceal" an attribute of illegal proceeds listed in the statute need not make the funds appear legitimate. To the contrary, a design to conceal generally makes the funds or an attribute of the funds "disappear." Making the funds or an

attribute of the funds appear to be something else is more naturally covered by the statutory term "disguise." Thus, transferring illegal proceeds to an offshore account to avoid taxation or forfeiture "conceals" the location and existence of the funds, but it does not transform them into apparently legitimate wealth. To the contrary, it creates the appearance of having no wealth at all.[2]

3. Petitioner notes (Br. 17) that the President's Commission on Organized Crime (Commission) defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, *and then* disguises that income to make it appear legitimate." President's Comm'n on Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering, Interim Report to the President and the Attorney General* 7 (1984) (*Commission Interim Report*) (emphasis added).[3] In the statute, however, Congress departed from the language in

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[2] Under the anti-surplusage canon of statutory construction, courts have a duty "to give effect, if possible, to every clause and word of a statute." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955)); see *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (describing anti-surplusage canon as a "cardinal principle of statutory construction"). In order to give independent meaning to the statutory phrases "designed * * * to * * * disguise" and "designed * * * to conceal," 18 U.S.C. 1956(a)(1)(B)(i) and (a)(2)(B)(i), the phrases should be interpreted to encompass distinct classes of transactions and transportations.

[3] The Commission was established by President Ronald Reagan in 1983 and was directed to analyze organized crime, including the sources and amounts of its income, and to evaluate federal laws directed at combating organized crime. Exec. Order No. 12,435, 3 C.F.R. 244 (1983). Its report led to the initiative in Congress to enact a money laundering offense. The money laundering statute was enacted two years later, in October 1986.

the Commission's definition in several ways, including through the use of "or" rather than "and" in the "conceal or disguise" provision. This drafting choice is consistent with the overall approach that Congress took to the money laundering statute: while its terms capture what is conventionally understood to be "money laundering," Congress also reached a broader range of conduct in order to prevent laundering strategies and concealment of funds that would evade a narrower prohibition.

4. Petitioner also argues (Br. 21-23 & n.11) that the "overall structure" of the statute compels the conclusion that the "conceal or disguise" provision is, in fact, an "appearance of legitimate wealth" provision. The argument goes: (1) the "conceal or disguise" provision is identically worded in the "financial transaction[]" and the "international transportation" subsections of 18 U.S.C. 1956(a); (2) "the *only* way" (Pet. Br. 21) a financial transaction can "conceal or disguise" the relevant attributes of illegal proceeds is to make the proceeds appear legitimate; and (3) therefore, an international transportation cannot "conceal or disguise" within the meaning of the statute unless it too is designed to make illegal proceeds appear legitimate. Petitioner is correct at step one, but his logic fails at steps two and three.

In particular, petitioner is incorrect (Br. 21-22) that a financial transaction can conceal the relevant attributes of illegal proceeds "*only*" by making the proceeds "appear[] to be the product of legitimate commercial activity." Although petitioner asserts (Br. 21) that a transaction "is not a tangible opaque thing, like a vault or a wall, that can be employed to hide money or property from prying eyes," the statutory definition of "transaction" includes "use of a safe deposit box," which is exactly "like a vault." See 18 U.S.C. 1956(c)(3). The use of

a safe deposit box cannot make illegal proceeds appear legitimate or otherwise disguise them. But it can conceal their location, which violates the statute when that is the design of the transaction.[4] In 1992, Congress amended Section 1956 to add the use of safe deposit boxes to the statutory definition of "transaction." See Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672. That amendment refutes petitioner's argument that an "appearance of legitimate wealth" requirement is implicit in the statute.

Furthermore, other types of transactions also can be designed to conceal attributes of illegal proceeds without making the launderer's wealth appear legitimate. A defendant who merely transfers illegal proceeds to his offshore account has concealed the location of the proceeds but has created no appearance that they were earned legitimately. A defendant who uses a fictitious name on that same offshore account has concealed his ownership and control of the funds but has come no closer to creating an appearance of legitimate wealth. Like a safe deposit box, bank accounts can indeed "hide money or property from prying eyes," and thus can "conceal" attributes of funds without also disguising the funds as "legitimate

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[4] See *United States* v. *Stephenson*, 183 F.3d 110, 120 (2d Cir.) (affirming conviction under Section 1956(a)(1)(B)(i) where defendant caused his wife to place $27,800 in drug proceeds in safe deposit box "so as to conceal" them), cert. denied, 528 U.S. 1013 (1999); see also *United States* v. *Bowman*, 235 F.3d 1113, 1115-1116 (8th Cir. 2000) (affirming convictions under Section 1956(a)(1)(B)(i) where defendant deposited $1,640,000 in bank-robbery proceeds in multiple safe deposit boxes in his own name and shifted the proceeds between boxes; jury could conclude that defendant's conduct was designed "to make tracking the money difficult").

wealth." Pet. Br. 21.[5] As those examples show, petitioner's theory ignores the reality that Congress' concern was with a variety of mechanisms to conceal or disguise illegitimate wealth, and it was not focused exclusively on just one way to do so–viz., making illegitimate wealth look legitimate.

Even if it were true that financial *transactions* designed to conceal one or more of the relevant attributes of illegal proceeds often will result in an "appearance of legitimate wealth," it does not follow logically that the statute covers only a cross-border *transportation* that has that effect. As petitioner concedes (Br. 23), the context of a phrase matters. A "transportation" of illegal proceeds ordinarily will involve a "carrying" of the funds from one geographical location to another. See, *e.g.*, *American Heritage Dictionary of the English Language* (4th ed. 2000) (to "transport" means to "carry from one place to another; convey"); *Webster's Third* 2430 (to "transport" means to "transfer or convey from one person or place to another: carry, move"). Because of its essentially spatial nature, a "transportation" of funds is more likely to be designed to conceal, at a minimum, the "location" of illegal proceeds and may less often be designed to conceal the "nature" or "source" of the proceeds (although those attributes will often be concealed as well). That result is entirely consistent with

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[5] See *United States* v. *Cihak*, 137 F.3d 252, 262 (5th Cir.) (following co-defendant's conviction, defendant's hasty liquidation and transfer of illegal assets to his own accounts abroad showed design to conceal source and location of funds), cert. denied, 525 U.S. 847, and 525 U.S. 888 (1998); *United States* v. *Abbell*, 271 F.3d 1286, 1298 (11th Cir. 2001) (lawyer who deposited "hush money" in inmates' accounts using drug-cartel proceeds concealed the source of the funds; statute does not require that appearance of legitimate wealth be generated).

the statutory language. Moreover, in the particular context of trans-border transactions, the need to disguise illegitimate wealth as legitimate wealth is reduced. The very act of getting the funds out of the country significantly reduces the chance that substantial quantities of unexplained cash that would betray the criminal nature of an enterprise will be detected.

Congress focused the international provision of the statute on the "transportation" itself—not, as petitioner urges (Br. 30), on "transactions" that might follow the transportation. It would have made no sense for Congress to have required the government to establish the uses to which funds might be put in the future after they are secreted abroad. Just as removing illegitimate funds from the country decreases the chance that those funds will be detected by United States authorities, the removal of the funds makes it more difficult for United States authorities to determine what happens next to the funds. Accordingly, petitioner's proposed requirement would enable money launderers to frustrate enforcement efforts because of the inability of the government to identify the foreign laundering networks who might aid domestic criminals once the funds were successfully exported. Instead of requiring proof of post-transportation designs, Congress focused on how the transportation itself was "designed." And Congress underscored that focus by including "location"—a similarly spatial concept—as one of the attributes of illegal proceeds that may be the object of the prohibited concealment under the statute. Congress further provided that the design to conceal need be shown with respect to only *one* of the attributes of illegal proceeds for the offense to be established. All of those choices indicate that Congress did *not* intend to draft a statute that could be violated in only

one way that was tied to ultimate efforts to cleanse illegal funds. Rather, Congress drafted a statute that would comprehensively reach the variety of ways that criminals would seek to dispose of their illegal proceeds, without saddling the government with unduly onerous burdens of proof.

5. Petitioner argues (Br. 14-15) that the title of 18 U.S.C. 1956 (2000 & Supp. V 2005), "Laundering of monetary instruments," supports his view that the statute covers only conduct that creates the appearance of legitimate wealth. This Court has repeatedly held that "the title of a statute . . . cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947)). That axiom is particularly relevant to the money laundering statute because "[t]he phrase 'money laundering' has been used in very different senses" and "Congress has used it loosely in legislative history, sometimes limiting it to the classic core but also including the currency reporting requirements." B. Frederic Williams, Jr. & Frank D. Whitney, *Federal Money Laundering: Crimes and Forfeitures* 5 (1999).[6] See, *e.g.*, 31 U.S.C.

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[6] The commentators further explained:

> Congress has never prohibited 'money laundering,' but targeted certain conduct which it specified in technical detail without ever using the phrase within the text of the statute. * * * The phrase has no value except as a convenient short hand for the offenses specified in [Sections] 1956 and 1957 or perhaps the general problem these and the currency reporting statutes were designed to constrain. Whether conduct meets anyone's concept of what is "money laundering" is irrelevant to whether conduct violates one of these sections. If conduct meets all the elements of one of these

5340(2) (defining "money laundering and related financial crime" as "the movement of illicit cash or cash equivalent proceeds into, out of, or through the United States, or into, out of, or through United States financial institutions).

Moreover, the same statute includes both "promotional" money laundering (18 U.S.C. 1956(a)(1)(A)(i))—transactions that plow proceeds back into an illegal enterprise—and the transportation of *any* funds across the United States border with the intent to promote specified unlawful activity (18 U.S.C. 1956(a)(2)(A)). Neither of those offenses constitutes "traditional" money laundering under petitioner's definition. There is thus no basis for petitioner's argument that an "appearance of legitimate wealth" requirement should be inferred from the title of the statute.[7]

B. The Legislative History Does Not Support Petitioner

Because the statutory text defeats petitioner's argument that 18 U.S.C. 1956(a) contains an implicit "appearance of legitimate wealth" requirement, there is no need to resort to legislative history. See, *e.g.*, *Whitfield*

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offenses, the statute is violated even if the conduct could not be called money laundering by any particular definition.

Williams & Whitney, *supra*, at 6.

[7] Petitioner also cannot support an "appearance of legitimate wealth" requirement merely by citing cases that, on their own facts, would have met such a requirement if it existed. See Pet. Br. 25-27. One of the cases petitioner cites for its complex facts alone, *United States* v. *Bockius*, 228 F.3d 305 (3d Cir. 2000), actually undercuts petitioner's argument that Section 1956 is limited to conduct that creates an "appearance of legitimate wealth." In *Bockius*, the Third Circuit recognized that the money laundering statute has an "inclusive scope" that extends beyond the traditional understanding of that term. *Id.* at 312-313.

v. *United States*, 543 U.S. 209, 215 (2005). If consulted, however, the legislative history does not assist petitioner. Petitioner's argument for an "appearance of legitimate wealth" requirement relies heavily on his assertion that the statute has a single purpose. Petitioner refers to the "specific evil" (Br. 14) addressed by the statute and asserts that "Congress's sole concern was with the ultimate act of sanitizing the proceeds of illegal activity to remove its illicit taint" (*id.* at 24-25). Petitioner's suggestion that Congress enacted Section 1956 as a surgical strike on only those defendants who manipulate illegal proceeds to create the appearance of legitimate wealth lacks merit. Certainly, "traditional" money laundering and its increasing level of sophistication was a central concern of Congress. "But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). See *Gonzales* v. *Oregon*, 546 U.S. 243, 288 (2006) (finding "no reason to think" that a statute's "*principal* concern" is its "*exclusive* concern") (Scalia, J., dissenting). The legislative history of 18 U.S.C. 1956 confirms what its text makes clear: Congress's purpose was to address a spectrum of conduct—including but not limited to "traditional" money laundering—that impairs the ability of law enforcement to find and recover the proceeds of crime. Indeed, Congress's principal focus could be aptly described as addressing efforts to disguise or conceal illegitimate funds. Making illegitimate funds appear legitimate is just one means to that end and making the funds disappear by secreting them out of the jurisdiction works well too—and there is no reason that Congress would

have been concerned with only one aspect of the problem.

1. As noted, note 3, *supra*, the initiative to enact criminal federal money laundering legislation to supplement currency reporting requirements began with the appointment of the Commission. In March 1984, the Commission held a public hearing on money laundering. The Commission's chairman, Irving R. Kaufman (Kaufman), opened the hearing by outlining a variety of law enforcement challenges the Commission sought to address, which included not only the investment of criminal proceeds in the legitimate economy, but also the concealment of funds from taxation and civil forfeiture. President's Comm'n on Organized Crime, *Organized Crime and Money Laundering, Record of Hearing II, March 14, 1984, New York, New York* 6-7 (1984) (*Record of Hearing*).[8] Kaufman noted that laundering "schemes are conducted in a number of different fashions," including through the "simpl[e] deposit [of] large sums of cash with an off-shore financial institution." *Id.* at 6.

In its interim report, the Commission made clear that it viewed "laundering" as encompassing a "broad spectrum of techniques." *Commission Interim Report* 7. "At one end of the spectrum" was the "narcotics trafficker who wishes merely to increase the immediate portability of his cash receipts [by] simply exchang[ing] smaller-denomination bills (*e.g.*, one-, five-, and ten-dollar bills) for larger-denomination bills." *Id.* at 8. "At the other end of the spectrum" was the "high-level member of a large organization that derives vast sums

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[8] Kaufman stated: "Whatever technique is employed, the result is the same. When criminals launder funds they avoid both taxation and the possibility of loss in civil forfeiture proceedings." *Record of Hearing* 7.

of money from continuing illegal activities." *Ibid.* The Commission observed that the more sophisticated criminal's laundering techniques could include "the use of courier services or electronic fund transfers, the processing of funds through layers of fictitious entities, and the creation of false documentation to improve the appearance of legitimacy." *Ibid.* The Commission Interim Report also expressed specific concern about the law enforcement challenge presented by the physical transportation of illegal funds across the southern borders of the United States, providing as one example a "Mr. X" who on one occasion attempted to transport boxes containing $5 million in unreported cash to Panama on his Learjet. *Id.* at 14-15. Thirty kilograms of cocaine and an Uzi submachine gun were later found in Mr. X's "business office." *Ibid.*

The Commission prepared a draft of a new criminal offense, which it entitled "Laundering of monetary instruments." *Commission Interim Report* 67. The Commission's proposal criminalized participation in any transaction involving monetary instruments in, through, or by a financial institution (1) with the intent to promote unlawful activity or (2) with knowledge or reason to know that the monetary instruments were derived from unlawful activity. *Ibid.*[9]

2. In October 1985, the Senate Committee on the Judiciary held hearings on three bills (S. 572, 99th

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[9] The statute ultimately enacted by Congress bore the same title. The origin of the title in the Commission's proposal further undercuts petitioner's argument (Br. 14-15) that the term "laundering" limits the scope of the statute to offenses involving an "appearance of legitimate wealth." The offense proposed by the Commission was very broad and contained no hint of the limitation that petitioner now indicates is implicit in the title of the statute.

Cong., 1st Sess.; S. 1335, 99th Cong., 1st Sess.; and S. 1385, 99th Cong., 1st Sess.) to create, among other things, a criminal money laundering offense.[10] In March 1986, the Judiciary Committee held additional hearings. The witness testimony and lawmaker remarks at both hearings reflected an understanding that "laundering" as Congress understood it encompassed simpler techniques to smuggle and hide illegal proceeds abroad, as well as more sophisticated schemes.

For example, a United States Justice Department official testified that "some criminal organizations still wash their own illegally generated money by such relatively crude methods as one of their members' smuggling a suitcase full of currency out of the country for deposit in an offshore bank." *Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 57 (1985) (statement of Stephen S. Trott, Assistant

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[10] S. 572, *supra*, and S. 1385, *supra*, substantially tracked the Commission's proposal for Section 1956. *Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 38-43 (1985). S. 1335 was prepared by the United States Department of Justice and the United States Treasury Department. *Id.* at 1. Its draft of Section 1956 tracked the substance (although not the precise words) of the Commission's proposal, but (1) included transactions that affected interstate commerce even if they did not involve financial institutions and (2) substituted a "reckless disregard" standard for the Commission's "reason to know" standard applicable to the category of transactions involving illegal proceeds of crime. *Id.* at 6. S. 1335 also included a proposal for a separate criminal provision entitled "Receiving the proceeds of a crime." That proposal would have created a ten-year felony for anyone who "receives, possesses, conceals, or disposes of" money or property obtained in connection with a felony offense or for anyone who "brings or transfers" into the United States money or property obtained in connection with a felony violation of foreign drug trafficking laws. *Id.* at 20.

Attorney General, Criminal Division). Testimony from the Executive Director and Chief Counsel of the Commission emphasized the need for legislation to target the entire money laundering "process" in order to enable law enforcement "to intercept the money launderers, and the money, and the cash, and the profits, before they enter the bank." *Id.* at 100 (Testimony of James D. Harmon, Jr., Executive Director and Chief Counsel, President's Commission on Organized Crime).

Senator Joseph Biden expressed concern during his questioning of a Treasury Department official that as banks improved their compliance with reporting requirements to combat money laundering, "the down side" could be that criminals would revert to "physically transport[ing] [illicit cash] out of the United States by cargo and in luggage and by air." *White Collar Crime (Money Laundering): Hearings on Oversight of the Problem of White Collar Crime Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. Pt. 2, at 23 (1986) (*1986 Senate Hearings*) (statement of Senator Joseph Biden during questioning of David D. Queen (Queen), Acting Assistant Secretary for Enforcement and Operations, Department of the Treasury). Senator Biden noted that the Customs Service "ha[d] enough problem[s] trying to figure out what is coming into the country, let alone what is going out." *Ibid.* The Treasury Department official noted that the Customs Service recently had "interrupted" "several major currency smuggling operations[,] * * * some carrying $2 and $3 and $4 million in small bills out of the country." *Id.* at 35 (testimony of Queen). The official observed that the events were "in some ways * * * heartening because it is indicative of the fact that large-scale money laundering operations or illicit criminal organizations do not

feel comfortable processing their money through our banking institutions because of the improved degree of compliance." *Ibid.*

3. The bill (S. 2683, 99th Cong., 1st Sess. (1986)) that included the final version of 18 U.S.C. 1956 (2000 & Supp. V 2005) resulted from a bipartisan effort in the Senate Judiciary Committee to "address the concerns raised [about the prior bills] and to formulate consensus money laundering legislation." S. Rep. No. 433, 99th Cong., 2d Sess. 4 (1986). The Senate Report indicated that 18 U.S.C. 1956(a)(2) was "designed to illegalize international money laundering transactions" and defined the physical transportation of cash into and out of the United States as "laundering" activities in and of themselves:

> [Section 1956(a)(2)] covers situations in which money *is being laundered by* transferring it into the United States as well as those in which money *is being laundered by* transferring it out of the United States. The inclusion of this section is intended to support recent United States' efforts to obtain international cooperation to halt the flow of drug money, and to prevent the United States from becoming a haven in which foreign drug traffickers can keep or invest their earnings.

S. Rep. No. 433, *supra*, at 11 (emphasis added).

4. Petitioner recites few details from this legislative history and instead generalizes (Br. 28-29) that the "legislative record was unambiguous" that Congress was "concerned with the processes by which criminal organizations gained access to their illegitimate wealth by removing any appearance of illegality from their proceeds." That generalization does not assist petitioner. Congress *was* concerned about "processes" for

"removing any appearance of illegality from [criminal] proceeds." But disguising funds as legitimate is only *one* way to dispose of illegitimate funds such that they will be less likely to betray the criminal activity that generated them. And the legislative history reveals that Congress did not confine "laundering" to a single model or view it as amenable to a narrow solution. Congress's concern was that criminal organizations were profitable and increasingly more sophisticated, and that law enforcement needed better tools to find and seize illegal proceeds *no matter how* criminals sought to conceal or disguise them.[11] Stopping criminals from converting illegal proceeds into apparently legitimate assets was one aspect of the law enforcement challenge, but so was stopping the surreptitious flow of illegal proceeds across the border where they would be more difficult, if not impossible, to find. It was no oversight that Congress drafted a criminal statute that punishes the concealment or disguising of the attributes of illegal proceeds without use of the limiting phrase "appearance of legitimate wealth." That phrase would have hamstrung the effort to solve a broader problem. This Court should reject petitioner's invitation to read that phrase into the statute now.

5. Petitioner argues (Br. 30) that the statement in Senate Report No. 433, *supra*, that 18 U.S.C. 1956(a)(2) would cover "situations in which money is *being laun-*

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[11] Congress's broad enforcement goals are further illustrated by 18 U.S.C. 1957, which was enacted at the same time as Section 1956. Section 1957 creates a ten-year felony for engaging or attempting to engage in any monetary transaction by, to, or through a financial institution with the proceeds of specified unlawful activity if the property has a value exceeding $10,000 and the defendant knows the funds are derived from crime.

dered by transferring it" into or out of the United States demonstrates Congress's intent to reach only "transportations that are necessary preludes to further laundering transactions." Neither the text of the statute nor the legislative history supports that conclusion. Congress could have drafted Section 1956(a)(2) to require that the cross-border transportation of illegal proceeds be designed to "deliver the funds to a location where transactions that conceal or disguise the funds" would occur, as petitioner suggests. Indeed, Congress could have used words equivalent to those it employed in the "promotion" subsection of the same statute—transportation of illegal proceeds "with the intent to" engage in transactions that conceal or disguise the funds. 18 U.S.C. 1956(a)(1)(A)(i). But Congress did not write the statute that way, and there is no indication in the legislative history that one who transports illegal proceeds across the border in a way that conceals their attributes *also* must intend that the cash be transformed, through future transactions, into seemingly legitimate wealth.

Instead, Congress viewed "laundering" as a term that encompassed the transportation of funds into or out of the United States with the design to conceal or disguise an attribute of the proceeds, including its "location." The reason is that such transportation *vel non* would frustrate the ability of law enforcement to find the money—and thus prevent the funds from betraying the criminal nature of the enterprise, while at the same time permitting the launderer to evade taxes or forfeiture, promote further illegal activity, *or* transform the money into untraceable funds. That conclusion is reinforced by one of the stated purposes of Section 1956(a)(2)—"to obtain international cooperation to halt the flow of drug money." S. Rep. No. 433, *supra*, at 11.

This objective would be ill-served if drug money could *only* be halted at the border under this provision in the unlikely event that the government knew of the defendant's plans to engage in transactional money laundering in the future.

6. Petitioner also is incorrect (Br. 31) that the decision of the court of appeals "would resurrect the overbroad proposals that Congress rejected." Congress explained three ways in which 18 U.S.C. 1956 (2000 & Supp. V 2005) as enacted differed from the proposals Congress had considered. First, the statute as enacted contained heightened scienter requirements (the consensus bill "employ[ed] a scienter standard of 'knowing,' rather than 'reason to know' or 'reckless disregard'"). Second, the statute took "a qualitatively different approach" to "the nature of the transactions that it covers" by "applying its coverage to those transactions that can be said to constitute the core of money laundering—transactions designed to conceal or disguise the nature, location, source, ownership, or control of criminal proceeds, or to evade Federal or State cash reporting requirements" (the Commission's bill had "limited its coverage to bank transactions" and the administration bill "extended coverage to all transactions affecting interstate or foreign commerce"). Third, the statute "str[uck] a balance" between the Commission's bill (which limited its application to the proceeds of Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, predicate crimes) and the administration bill (which covered the proceeds of any State or Federal crime) by "covering the proceeds of Federal financial offenses and foreign drug offenses as well as RICO predicate offenses." See S. Rep. No. 433, *supra*, at 9.

Petitioner's argument is directed only to the second modification. Petitioner contends (Br. 31) that, unless an "appearance of legitimate wealth" requirement is read into the "conceal or disguise" provision of the statute, the statute will revert to covering "all transactions or transportations involving illicit money" because "[v]irtually *every*" transaction or international transportation in illegal funds "will involve some level of concealment and secrecy, lest the criminals expose their underlying criminal activity." Petitioner is incorrect. Not every transaction in or transportation of illegal proceeds will evidence a design to conceal or disguise a pertinent attribute of illegal proceeds. A commercial purchase using illegally-earned money, for instance, may or may not be designed to conceal or disguise attributes of the funds. So too with a mere deposit of illegal funds into a personal bank account, or a transfer of funds between accounts. When the circumstances surrounding a transaction or transportation do not demonstrate it was designed to conceal or disguise in the relevant sense, a money laundering conviction will not be supported by the evidence.[12] The result would be the same

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[12] See, *e.g.*, *United States* v. *Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003) (commercial purchases, deposit of funds into account, and single transfer of funds between accounts were insufficient to show that transactions were designed to conceal); *Stephenson*, 183 F.3d at 120-121 (car purchase using illegal proceeds was insufficient to show design to conceal); *United States* v. *Herron*, 97 F.3d 234, 236 (8th Cir. 1996) (wire transfers alone did not evidence design to conceal), cert. denied, 519 U.S. 1133, and 520 U.S. 1129 (1997); *United States* v. *Willey*, 57 F.3d 1374, 1388 (5th Cir.) (mere transfer of funds between accounts was insufficient to show design to conceal), cert. denied, 516 U.S. 1029 (1995); *United States* v. *Sanders*, 929 F.2d 1466, 1472 (10th Cir.) (buying a car in own name or daughter's name with drug proceeds is not a

under the court of appeals' decision; indeed, the court applied the same analysis in this case. Pet. App. 16a.

Moreover, the Senate Report indicates that the "concept" for the international transportation provision of Section 1956 was "derived" from the provision in the administration's bill for receiving the proceeds of a crime. S. Rep. No. 433, *supra*, at 11. See note 10, *supra*. Section 1956(a)(2) "avoid[ed] two pitfalls" of the administration's proposal, "which would have been triggered by the mere receipt of property and by the recipient's mere 'belief' that the property represented the proceeds of crime." *Ibid.* The Senate Report indicates that, as enacted, the statute "requires that the accused defendant engage in an act of transporting or attempted transporting and either intend to facilitate a crime or know that the transaction [sic] was designed to conceal a crime." *Ibid.* Thus, in enacting Section 1956(a)(2) in particular, Congress elected to criminalize the cross-border transportation of illegal money that is designed to conceal, rather than criminalize the mere receipt of foreign drug money. Petitioner's argument (Br. 32) that the court of appeals' ruling "reverses" an "explicit choice by Congress" has no support.

C. The Bulk Cash Smuggling Statute Does Not Support Petitioner

Petitioner contends that his conduct could have been charged as a violation of 31 U.S.C. 5332 (Supp. V 2005), which makes "bulk cash smuggling" into or out of the United States a five-year felony, and that the availability of that charge means that his conduct was not covered by 18 U.S.C. 1956 (2000 & Supp. V 2005). The bulk

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violation of 18 U.S.C. 1956(a)(1)(B)(i); Section 1956 is not a money spending statute), cert. denied, 502 U.S. 846 (1991).

cash smuggling statute supports the government's position, not petitioner's.

1. The offense of bulk cash smuggling was created in 2001 as part of the USA PATRIOT Act.[13] The statute is violated when (1) with the intent to evade a currency reporting requirement under 31 U.S.C. 5316,[14] (2) a person knowingly conceals more than $10,000 in currency or monetary instruments on his person or in a conveyance, piece of luggage, merchandise, or other container, and (3) transports or attempts to transport the funds across the United States border in either direction. 18 U.S.C. 5332 (Supp. V 2005). The statute provides for criminal and civil forfeiture of any property involved in the violation. The statute was enacted in response to *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which held that, when a violation of only a currency reporting offense is proved, forfeiture of the full amount of the unreported currency would violate the Excessive Fines Clause. *Id.* at 337-340. See *United States* v. *Jose*, 499 F.3d 105, 109-110 (1st Cir. 2007).

Unlike money laundering, the offense of bulk cash smuggling requires no evidence that the smuggled funds were derived from illegal activity. Bulk cash smuggling is shown when a defendant knowingly conceals more than $10,000, whether legally- or illegally-derived, *and* acts with the intent to evade the requirement for filing a currency transaction report. Neither of these two requirements (a threshold amount of

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[13] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 371, 115 Stat. 336.

[14] Section 5316 requires the filing of a Currency and Monetary Instrument Report whenever monetary instruments of more than $10,000 are transported into or out of the United States. 31 U.S.C. 5316.

$10,000 or the intent to evade a reporting requirement) applies under the money laundering statute. Rather, in an international money laundering case, the government must prove that the funds at issue, which can be of any amount, were derived from specified unlawful activity and that the defendant knew the funds were illegal proceeds. In addition, the government *may* prove that the defendant's cross-border transportation was designed in whole or in part to avoid a transaction reporting requirement, in which case it will have proven a 20-year felony (see 18 U.S.C. 1956(a)(2)(B)(ii)),[15] or the government may prove, among other things, that the transportation was designed to conceal or disguise a pertinent attribute of the proceeds.

2. In light of these differences, petitioner's argument (Br. 35) that the bulk cash smuggling statute was "plainly enacted to address the conduct at issue here" is without merit. It is questionable whether the government even could have proved, as it must under the bulk cash smuggling statute, that petitioner knew of the currency transaction reporting requirement at the border and intended to evade it. Petitioner was stopped 114 miles from the border, and there is no record evidence that petitioner was on notice of the requirement. Cf. *United States* v. *Tatoyan*, 474 F.3d 1174, 1177 (9th Cir. 2007) (evidence was sufficient to show actual knowledge of reporting requirement where inspector explained requirement to defendants orally, defendants were given a customs form, placards were posted around airport, and defendants' passports detailed the requirement in writing).

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[15] Petitioner does not contend that he should have been charged under 18 U.S.C. 1956(a)(2)(B)(ii), which would not have changed his sentencing exposure.

More importantly, petitioner's crime entailed culpable conduct not addressed by the bulk cash smuggling statute. The evidence in this case showed that the cash petitioner attempted to transport across the border was drug trafficking proceeds. Where the government can prove that funds in transport are derived from specified criminal activity and the defendant had knowledge of the unlawful nature of the proceeds, and where there is evidence that the transportation was designed to conceal or disguise the funds, bulk cash smuggling is not the appropriate charge because it does not reflect the gravity of the offense. Petitioner emphasizes (Pet. Br. 36) the difference in the maximum penalty between money laundering (20 years) and bulk cash smuggling (five years). The penalty difference, however, reflects the increased magnitude of the crime when the funds are not simply being smuggled, but are demonstrably the proceeds of criminal activity, the defendant has *knowledge* of that fact, and the transportation is designed to conceal or disguise one of the attributes of the illegal proceeds.

3. Petitioner recites (Br. 34) the statement in the House Report prepared in connection with the bulk cash smuggling bill that "[p]resently, the only law enforcement weapon against [bulk cash] smuggling is section 5316 of title 31, United States Code, which makes it an offense to transport more than $10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service." H.R. Rep. No. 250, 107th Cong., 1st Sess. Pt. 1, at 36-37 (2001). That statement does not assist petitioner. A currency reporting violation *was* the only available charge in a smuggling case where there was no evidence that the concealed currency was criminally

derived (such as *Bajakajian*). An ambiguous sentence in a House Report written 15 years after the money laundering statute became law permits no inference that Congress intended for the money laundering statute to contain an "appearance of legitimate wealth" limitation that is absent from its text and is contrary to its legislative history.

In fact, the opposite is true. In its statement of findings that accompanied the bulk cash smuggling bill, Congress declared:

> *The transportation and smuggling of cash in bulk form may now be the most common form of money laundering*, and the movement of large sums of cash is one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes.

USA PATRIOT Act, Pub. L. 107-56, § 371(a)(3), 115 Stat. 337; see § 371(b), 115 Stat. 337 (emphasis added). That finding directly refutes petitioner's argument that Congress could not have intended petitioner's conduct to constitute "money laundering" under 18 U.S.C. 1956(a)(2). Congress has consistently understood "money laundering" to encompass the surreptitious cross-border transportation (*i.e.*, smuggling) of illegal proceeds. What Congress lacked was a means to confiscate and forfeit bulk cash when it could not yet be tied to crime. Smuggling of that sort was a "reliable warning sign" of money laundering, but it could not be prosecuted under the laundering statute. A bulk cash smuggling offense provided the answer.

D. The Rule Of Lenity Is Inapplicable

Petitioner asserts incorrectly (Br. 14) that the rule of lenity is "a crucial aid in the construction of any crim-

inal statute." It is not. The rule of lenity applies only if, "at the end of the process of construing what Congress has expressed," including the use of ordinary tools of statutory construction, *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citations omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor "[t]he simple existence of some statutory ambiguity" is sufficient to warrant application of the rule. *Muscarello*, 524 U.S. at 138. The rule of lenity applies "only if, after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citations omitted).

There is no cause for resort to the rule of lenity (Br. 37-38) in this case. The text of the money laundering statute contains no "appearance of legitimate wealth" requirement and the plain meaning of the text is buttressed by the statute's purpose and legislative history. Congress has written a statute that "demonstrates breadth," not "ambiguity." *Sedima, SPRL* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (internal quotation marks and citation omitted). Moreover, the rule of lenity has the greatest force when the broader reading of a statute threatens to criminalize conduct that reasonable people could regard as innocent. See *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 703-704 (2005). There is no such danger here. The concealment of criminally-derived proceeds is inherently wrongful, and the requirements under Section 1956 that a defendant know of the illegal nature of the proceeds and know that the cross-

border transportation of those proceeds is designed to conceal or disguise one or more of their attributes ensures that innocent conduct will not be criminalized. See 18 U.S.C. 1956(a)(2)(B)(i).

E. The Evidence, Viewed Under A Correct Interpretation Of The Money Laundering Statute, Supports Petitioner's Conviction

The government was not required to prove that petitioner's transportation of drug proceeds to Mexico was designed to "create the appearance of legitimate wealth." The government was required to prove that the transportation was "designed in whole or in part" to "conceal or disguise" the nature, location, ownership, source, or control of the proceeds. The government clearly met that burden.

1. There is no dispute that petitioner's movement of drug proceeds toward Mexico in his car constituted "transportation" of those funds. It is also clear that any transportation of illegal funds covered by 18 U.S.C. 1956(a)(2)(B)(i) will be "designed" to alter the geographic location of illegal funds by moving them outside the United States (if the funds began in the country) or to a location inside the United States (if the funds began elsewhere). Whether that cross-border transportation of the funds also is "designed" to conceal or disguise one or more attributes of the funds within the meaning of 18 U.S.C. 1956 (2000 & Supp. V 2005) requires examination of the circumstances of the transportation and the inferences that can reasonably be drawn from the circumstances. See *United States* v. *Cruzado-Laureano*, 404 F.3d 470, 483 (1st Cir.) (design to conceal may be proved by direct or circumstantial evidence), cert. denied, 546 U.S. 1009 (2005).

As with any fact-intensive determination, a range of scenarios exists. If an individual transports illegal currency in a way that does not differ from how currency ordinarily is transported—such as in a wallet or purse or pocket—then no reasonable inference could be drawn, based on the transportation method alone, that the transportation was designed to conceal or disguise a pertinent attribute of the proceeds. If that same individual engages in no conduct designed to prevent the discovery of that money or to evade law enforcement, and makes no incriminating admissions, there would remain no reasonable basis for an inference that the transportation was designed to conceal or disguise a pertinent attribute of the proceeds. And if no independent evidence establishes that concealment or disguising of a pertinent attribute of the proceeds would occur at the point of destination, then a factfinder still would lack a reasonable and non-speculative basis for an inference that the transportation was "designed to conceal or disguise" within the meaning of the money laundering statute. See *United States* v. *Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992) (evidence insufficient to establish design to conceal or disguise when defendant possessed $8000 in airport, readily disclosed it to law enforcement and made no false exculpatory statements).

If any of those variables changes, then the result could change as well. An unusual method of concealing illegal proceeds during transportation could support an inference that the transportation is "designed to conceal" pertinent attributes of the funds. Evidence of unusual, evasive, or secretive conduct during the transportation could support the same inference. A damaging admission by the defendant or independent evidence that the purpose of the transportation was to conceal or

disguise an attribute of the proceeds as part of a larger effort to remove funds from the United States to avoid having the funds betray criminal activity would likewise support a conviction.[16]

2. A similar analysis applies in transactional money laundering cases when the transaction is a commercial purchase. As with the ordinary transportation of money, a degree of disguising or concealment is inherent in any ordinary purchase. Exchanging illegal funds for an item purposefully alters the location, ownership, and control of the funds and converts the funds into "a different and more legitimate-appearing form." *United States* v. *Willey*, 57 F.3d 1374, 1384 (5th Cir.), cert. denied, 516 U.S. 1029 (1995). Every such purchase therefore has the effect of concealing attributes of the funds. To prevent 18 U.S.C. 1956 (2000 & Supp. V 2005) from becoming a "money spending statute," courts examine the circumstances of the transaction to discern whether there is "more than a trivial motivation to conceal." *United States* v. *Garcia-Emanuel*, 14 F.3d 1469, 1474

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[16] For instance, in *United States* v. *Carr*, 25 F.3d 1194 (1994), cert. denied, 513 U.S. 939 (1994), and 513 U.S. 1086 (1995), the Third Circuit upheld a conviction for international money laundering where (1) the defendant received a carry-on bag from another person, (2) the defendant indicated at a customs checkpoint before boarding a plane to Colombia that he had only $4000 in cash, (3) the carry-on bag was found to contain $180,000 secreted in two coffee thermos mugs and a talcum powder container, (4) the defendant had an additional $6000 on his person, and (5) the defendant told a "highly suspicious, if not incredible, story" about retrieving the bag from a train station locker in response to an anonymous phone call. *Id.* at 1206. When concealment measures undertaken during the transportation are sufficiently unusual and probative, as in *Carr*, the jury reasonably can infer that the transportation has been "planned out in the mind," or "designed," to conceal the illegal proceeds by moving them abroad.

(10th Cir. 1994). Evidence that could support such a finding includes, but is not limited to:

> [S]tatements by a defendant probative of intent to conceal; unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; depositing illegal profits in the bank account of a legitimate business; highly irregular features of the transaction; using third parties to conceal the real owner; a series of unusual financial moves cu[lmin]ating in the transaction; or expert testimony on practices of criminals.

Id. at 1475-1476 (footnotes omitted).

3. The court of appeals applied these factors to the circumstances of this case and correctly held that petitioner's transportation of drug proceeds bore numerous indicia that the transportation was "designed" to "conceal or disguise" pertinent characteristics of the illegal funds. First, the transportation was designed to "conceal" the "location" and the "nature" of the funds by moving them to Mexico without detection by law enforcement. That design of the transportation was evidenced by petitioner's admitted destination of Mexico, the elaborate measures taken to convert the rear portion of the Beetle into a secret cargo compartment secured by screws, carpet tabs, and speaker boxes, and the use of scent-suppressing packaging materials on the money and animal hair around the compartment as a technique to distract drug-detection dogs.[17]

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[17] See *United States* v. *Garcia-Jaimes*, 484 F.3d 1311, 1322 (11th Cir. 2007) (evidence sufficient to support design to conceal in conspiracy case where defendants entered scheme to transport drug proceeds to Mexico in gas tanks on car hauler trailers; defendants "hid the money in the cars to prevent the authorities from finding it"), petition for cert. pending, No. 06-11863 (filed June 11, 2007); *United States* v. *Elso*, 422

The transportation also bore indicia of a design to conceal the "source," "ownership," and "control" of the proceeds. In transactional money laundering cases, the use of third parties is viewed as significant evidence of a design to conceal those attributes of illegal funds.[18] Here too, the evidence supports the conclusion that petitioner's transportation of illegal drug proceeds for an unidentified third person was designed to conceal the identity of that owner and controller of the funds. See *United States* v. *Garcia-Jaimes*, 484 F.3d 1311, 1322 (11th Cir. 2007) (plan to transport drug proceeds to Mexico "allowed the owner of the money to place it in the hands of a third party, which makes it difficult to determine both the owner and the source of the money"), petition for cert. pending, No. 06-11863 (filed June

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F.3d 1305, 1309 n.7 (11th Cir. 2005) (evidence sufficient to support design to conceal location of drug money where attorney retrieved drug proceeds from client's safe, loaded money in briefcase in car trunk, and attempted to drive proceeds to law office), cert. denied, 126 S. Ct. 2049 (2006); cf. *United States* v. *Farese*, 248 F.3d 1056, 1060 (11th Cir. 2001) (design to conceal "location" of proceeds evidenced by exchange of small-denomination bills into large-denomination bills; reducing volume of paper currency facilitates concealment for transportation out of country); *Stephenson*, 183 F.3d at 120 (design to conceal supported by evidence that defendant's wife put drug proceeds in safe deposit box at defendant's direction); *United States* v. *Wolny*, 133 F.3d 758, 760-761 (10th Cir. 1998) ("unusual secrecy" of hotel-room meeting supported inference of design to conceal).

[18] See, *e.g.*, *Abbell*, 271 F.3d at 1299 (payments made to cartel employees by attorneys were designed to conceal that cartel leader was source of money); *United States* v. *Powers*, 168 F.3d 741, 748 (5th Cir.) (intent to conceal source of illegal funds evidenced by use of checks made payable to third party), cert. denied, 528 U.S. 945 (1999); *United States* v. *Beddow*, 957 F.2d 1330, 1334-1335 (6th Cir. 1992) (intent to disguise ownership of proceeds evidenced by use of "front man" to transport money overseas and purchase emeralds).

11, 2007). Petitioner told the officers he did not know who paid him to drive the Beetle to Mexico, petitioner gave an inconsistent account at trial about how he came to possess the Beetle from a Mr. Morcia, and petitioner provided no satisfactory explanation for the lengthy bus journey, without luggage, that preceded his occupation of the Beetle. The conclusion that petitioner's transportation of illegal proceeds was designed to conceal the ownership and control of the funds was further evidenced by expert testimony that drug organizations utilize couriers who know little about the source of their cargo, precisely because this business model limits the information that can be provided to law enforcement in the event the driver is stopped. See *Garcia-Emanuel*, 14 F.3d at 1476 (expert testimony on practices of criminals can support finding of design to conceal or disguise).

Moreover, the court of appeals correctly viewed petitioner's substantial efforts at concealment *during* transportation as circumstantial evidence that the larger design of the transportation was to "successfully transport[] the funds to Mexico without detection" so that the funds would be "better concealed or concealable after the transportation than before." Pet. App. 16a. In the words of the dissent, the court of appeals determined that petitioner was "transporting money to conceal its location" and not just "concealing money to transport it." *Id.* at 27a. That finding was well-supported by the evidence.[19]

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[19] The facts and decision here contrast with those of *United States* v. *Dimeck*, 24 F.3d 1239 (10th Cir. 1994), upon which petitioner relies (Pet. Br. 27-28). Unlike this case, *Dimeck* involved neither cross-border transportation nor elaborate measures designed to conceal the location and nature of illegal proceeds from law enforcement. *Dimeck* involved

4. Petitioner argues (Br. 43) that it "simply is not rational to infer a further purpose of concealment at the destination from the mere fact that the money was hidden during transportation" and hypothesizes that the illegal funds might be used openly in Mexico to "finance a vacation" or make other purchases. Whatever is done with the illegal proceeds in Mexico, however, they have been surreptitiously moved to a location where United States law enforcement authorities are impaired from detecting and intercepting them. That conduct falls squarely within the terms of the statute and was a

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a plan to transport drug proceeds from Detroit to California. The intended recipient of the funds was a marijuana supplier who needed the money to pay his own suppliers. *Id.* at 1243. Dimeck merely delivered the drug proceeds in an unsealed box to a courier in a Detroit hotel room. Dimeck suggested that the courier put the money in his suitcase or "tape [the box] up" to take it to California. *Ibid.* (brackets in original). The proceeds traveled no farther, because the courier was a government informant who turned the money over to the Drug Enforcement Administration. *Ibid.*

The Tenth Circuit determined that Dimeck's "delivery of the money did not result in the kind of transaction prohibited by [18 U.S.C.] 1956(a)(1)(B)(i)." *Dimeck*, 24 F.3d at 1246. Because the evidence showed that the only purpose for which the money was being delivered was to permit the California supplier to pay his own suppliers, the court determined that on the facts of that case, the use of couriers and the "secrecy surrounding the funds" were not designed "to confuse or mislead anyone as to the characteristics of those proceeds, or to assist in allowing these proceeds to enter into legitimate commerce." *Ibid.* Instead, the transportation of the funds was "the final part of the [drug distribution] business deal." *Id.* at 1247. Thus, the holding in *Dimeck* is that transactional money laundering is not shown when the evidence demonstrates that funds are being delivered for the purpose of closing the "business deal." The manner in which the funds were transported was not the focus of the court and was irrelevant to the holding.

specific concern of Congress in enacting the cross-border transportation provision of the laundering offense.[20]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[20] The en banc dissent hypothesized that the result in this case would mean that a "young petty thief" who pickpockets a tourist in Texas and attempts to cross the border with the proceeds in his shoe would violate the money laundering statute. It is not clear that the dissent's example implicates any form of "specified unlawful activity" under the money laundering statute. Setting aside that difficulty, transporting currency concealed in a shoe is unusual enough (absent evidence that the defendant routinely transported money that way) to give rise to a reasonable inference that the transportation of illegally-obtained funds to Mexico in those circumstances was designed to conceal pertinent attributes of the money. Prosecution of such an offense under Section 1956 would be viable (but unlikely, given the petty nature of the underlying offense). If that same defendant instead secreted in his shoe a $500,000 money order representing the illegal proceeds of a scheme to defraud senior citizens of their retirement savings, then the claimed "absurdity" of the result is diminished.

APPENDIX

1. 18 U.S.C. 1956 (2000 & Supp. V 2005) provides:

Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a

place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) PENALTIES.—

(1) IN GENERAL.—Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) JURISDICTION OVER FOREIGN PERSONS.—For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, includ-

ing any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) COURT AUTHORITY OVER ASSETS.—A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) FEDERAL RECEIVER.—

(A) IN GENERAL.—A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsec-

tion (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) APPOINTMENT AND AUTHORITY.—A Federal Receiver described in subparagraph (A)—

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant—

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged

in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such

term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));[1]

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged

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[1] So in original. The second closing parenthesis probably should not appear.

offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embez-

zlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(*l*) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006[2] (relating to fraudulent Federal credit institution entries), 1007[2] (relating to Federal Deposit Insurance transactions), 1014[2] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032[2] (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section

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[2] So in original. Probably should be preceded by "section".

1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), or section 2339A or 2339B (relating to providing material support to terrorists), of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section

16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons)[3]

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal

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[3] So in original. Probably should be followed by a semicolon.

penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) NOTICE OF CONVICTION OF FINANCIAL INSTITUTIONS.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section

1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) VENUE.—(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person whc conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be

charged in any district in which the transaction takes place.

2. 18 U.S.C. 1957 provides:

Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation

as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

3. 31 U.S.C. 5332 (Supp. V 2005) provides:

Bulk cash smuggling into or out of the United States

(a) CRIMINAL OFFENSE.—

(1) IN GENERAL.—Whoever, with the intent to evade a currency reporting requirement under section 5316, knowingly conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container, and transports or transfers or attempts to transport or transfer such currency or monetary instruments from a place within the United States to a place outside of the United States, or from a place outside the United States to a place within the United States, shall be guilty of a currency smuggling offense and subject to punishment pursuant to subsection (b).

(2) CONCEALMENT ON PERSON.—For purposes of this section, the concealment of currency on the person of any individual includes concealment in any article of clothing worn by the individual or in any luggage, backpack, or other container worn or carried by such individual.

(b) PENALTY.—

(1) TERM OF IMPRISONMENT.—A person convicted of a currency smuggling offense under subsection (a), or a conspiracy to commit such offense, shall be imprisoned for not more than 5 years.

(2) FORFEITURE.—In addition, the court, in imposing sentence under paragraph (1), shall order that the defendant forfeit to the United States, any property, real or personal, involved in the offense, and any property traceable to such property.

(3) PROCEDURE.—The seizure, restraint, and forfeiture of property under this section shall be governed by section 413 of the Controlled Substances Act.

(4) PERSONAL MONEY JUDGMENT.—If the property subject to forfeiture under paragraph (2) is unavailable, and the defendant has insufficient substitute property that may be forfeited pursuant to section 413(p) of the Controlled Substances Act, the court shall enter a personal money judgment against the defendant for the amount that would be subject to forfeiture.

(c) CIVIL FORFEITURE.—

(1) IN GENERAL.—Any property involved in a violation of subsection (a), or a conspiracy to commit such violation, and any property traceable to such violation or conspiracy, may be seized and forfeited to the United States.

(2) PROCEDURE.—The seizure and forfeiture shall be governed by the procedures governing civil

forfeitures in money laundering cases pursuant to section 981(a)(1)(A) of title 18, United States Code.

(3) TREATMENT OF CERTAIN PROPERTY AS INVOLVED IN THE OFFENSE.—For purposes of this subsection and subsection (b), any currency or other monetary instrument that is concealed or intended to be concealed in violation of subsection (a) or a conspiracy to commit such violation, any article, container, or conveyance used, or intended to be used, to conceal or transport the currency or other monetary instrument, and any other property used, or intended to be used, to facilitate the offense, shall be considered property involved in the offense.

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IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The question in this case is whether the act of hiding illicit proceeds while transporting them internationally – without more – violates 18 U.S.C. § 1956(a)(2). The Government clearly wants the answer to that question to be yes, but it cannot identify any coherent interpretation of the statute to produce that result. Its overly-expansive view of the statute is internally contradictory, inconsistent with the statute's text, and contrary to its fundamental objectives.

Properly understood, § 1956(a)(2) criminalizes the act of transporting illicit funds for the purpose of concealing or disguising *certain attributes* of those funds – attributes which, if known, would help expose the funds' criminal taint. The statute does *not* prohibit the more general act of concealing the funds themselves during transport, as the Government insists. Indeed, the Government *wanted* to prohibit this general conduct when § 1956(a)(2) was originally proposed, but Congress explicitly rejected that proposal in favor of the statute as written. The Government now seeks to resurrect its defeated proposal by rewriting the statute in favor of a general prohibition on concealing or disguising the illicit funds themselves. That is not what the statute says, and it is not what Congress intended.

Petitioner's reading, by contrast, reconciles the statute's text, structure, and purpose. And it does so without requiring any revisions of the statutory text, contrary to the Government's contention. The requirement that a transaction or transportation be

designed to create the appearance of legitimate wealth merely encapsulates the meaning and effect of the particular *attributes* that must be concealed. Exposing those attributes reveals the funds' connection to criminals or to criminal activity; likewise, concealing those attributes tends to make the funds "appear legitimate" by obscuring any obvious connection to criminals or to criminal activity.

Because the evidence here shows only that petitioner physically hid illicit bulk cash in his car during transit – and not that he knew of some further design to conceal attributes of the cash that would expose its illegitimacy – his conviction must be reversed.

ARGUMENT

I. SECTION 1956(a)(2) DOES NOT CRIMINALIZE THE PHYSICAL CONCEALMENT OF ILLICIT PROCEEDS DURING INTERNATIONAL TRANSPORTATION

A. The Government's Construction Of § 1956(a)(2) Is Incoherent

According to the Government, the mere act of transporting illicit funds out of the country constitutes criminal money laundering under the statute's plain text. This construction of § 1956(a)(2) is as wrong as it is brazen.

The Government's theory starts from the premise that § 1956 was enacted because "law enforcement needed better tools to find and seize illegal proceeds *no matter how* criminals sought to conceal or disguise them." U.S. Br. 30. Congress accordingly

sought broadly to criminalize *all* "efforts to disguise or conceal illegitimate funds." *Id.* at 24.

Consistent with that supposed objective, a prohibited "concealment" under the statute as the Government construes it is any transaction or transportation designed to "make detection" of the *funds themselves* "less likely." *Id.* at 16; *see id.* at 12 (statute prohibits transportation of illegal proceeds "knowing of the design of the transportation to hide the funds themselves, their illegal origins, their ownership, and their control"); *id.* at 17 (to violate the statute, a person need only knowingly "'conceal' the location or existence of the funds"); *id.* at 37 (money laundering charge is appropriate where "transportation was designed to conceal or disguise the funds"). And because the "very act of getting the funds out of the country significantly reduces the chance that substantial quantities of unexplained cash that would betray the criminal nature of an enterprise will be detected," the mere act of transporting illicit funds internationally violates the statute. *Id.* at 21; *see id.* at 15 ("An equally effective way to 'disguise' illegitimate funds is to get them out of the country altogether, in which case they will not betray the illicit nature of an unlawful enterprise.").[1]

That reading of the statute is unsustainable. Indeed, even the Government does not have the courage of its own construction. After strenuously insist-

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[1] With respect to petitioner's conviction specifically, the Government argues that his conviction should stand because "the transportation was designed to 'conceal' the 'location' and the 'nature' of the funds by moving them to Mexico without detection by law enforcement." *Id.* at 43.

ing that § 1956(a)(2) criminalizes international transportations that make detection and recovery of illicit funds more difficult – which is to say *all* international transportations – the Government immediately introduces qualifiers that are inconsistent with its own reading of the text, thereby demonstrating the fundamental inadequacy of that reading.

1. If simply transporting illicit proceeds across the border were sufficient under the statute, the entire "designed to conceal" element would be superfluous. *See FCC v. NextWave Pers. Comm'ns, Inc.*, 537 U.S. 293, 302 (2003) (interpretation rendering language superfluous "must be rejected"). The "anti-surplusage canon" (U.S. Br. 17 n.2) is especially important where, as here, the provision effectively being read out of the statute "occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). If the Government's interpretation of the "design to conceal" element were correct, that detailed requirement would have "no operative effect" on the international transportation prong of § 1956(a) – the statute would be satisfied by international transportation itself. At a minimum, the Government's construction would render the five listed attributes meaningless – the statute would simply criminalize cross-border transportations "designed . . . to conceal . . . the proceeds of unlawful activity." 18 U.S.C. § 1956(a)(2)(B)(i). A statute written that way would have been consistent with the Government's position; the statute Congress actually wrote is not.

Plainly, had Congress intended to capture the mere hiding of the proceeds themselves, it could have done so easily. As petitioner has noted (Petr.

Br. 32-33), the Bulk Cash Smuggling ("BCS") statute – unlike § 1956 – criminalizes the act of concealing the money itself, rather than a precisely-drawn list of certain attributes of that money. *See* 31 U.S.C. § 5332(a)(1) (statute targets anyone who "conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container"). Similarly, it would have been enough for Congress to say – as the Government originally wanted Congress to say – that the mere act of transporting illicit proceeds internationally is criminal money laundering. But Congress instead chose to address only those international transportations whose *purpose* is to conceal five telltale traits that betray the illegitimate nature of the proceeds. Petr. Br. 40; *see infra* at 17-19.

2. Tacitly acknowledging the implausibility of its broad reading of the concealment element, the Government introduces qualifiers that undermine its reading. To start, the Government occasionally seems to concede that funds at least must be physically hidden during cross-border transport to constitute "concealment." *See* U.S. Br. 38 ("surreptitious cross-border transportation (*i.e.*, smuggling) of illegal proceeds"); *id.* at 24 ("making the funds disappear by secreting them out of the jurisdiction works well" to "conceal illegitimate funds"); *id.* at 47 n.20 (hiding cash in shoe while crossing border). But if simply moving the funds to another country is concealment because it reduces the chance they will expose the illegitimacy of an unlawful enterprise, then the requirement of physical hiding would be superfluous – the prohibited "design to conceal" would be ade-

quately inferred from the act of moving the money offshore. The Government's insertion of a physical hiding qualifier is a tacit acknowledgment that "concealment" must require something more than a simple effort to make illicit funds more difficult to find and recover.

Indeed, the Government ultimately goes further, acknowledging that not even the physical hiding of illicit funds during transport can be enough to establish an unlawful concealment. The Government concedes that because all travelers normally keep money out of sight, "a degree of disguising or concealment is inherent" in every "transportation of money." U.S. Br. 42. Thus, says the Government, § 1956(a)(2) is implicated only where "an individual transports illegal currency in a way that . . . differ[s] from how currency ordinarily is transported – such as in a wallet or purse or pocket." *Id.* at 41. Put differently, "concealment measures undertaken during the transportation" must be "sufficiently unusual and probative" before a prohibited concealment will exist. *Id.* at 42 n.16. This "unusual measures" qualifier has no basis in the statute's text – the Government adds it only to make its construction seem plausible.

But it does not even serve that end: the "unusual measures" qualifier is, in practice, no qualifier at all. No "wallet or purse or pocket" yet devised is large enough to contain the type of illicit bulk cash involved in transportation money laundering. Further, no person carrying bulk cash – especially *illicit* bulk cash – would just stuff it in his pocket; like anyone carrying large amounts of money abroad, a person carrying illicit cash across the border will *al-*

ways take extra measures to hide it from prying eyes, whether it be in a locked case, a car trunk, or a hidden compartment.[2] In other words, the Government's reading, even as qualified by the "unusual measures" test, would again effectively criminalize *every* international transportation of illicit proceeds.[3] The Government essentially concedes as much by agreeing that a pickpocket who hides the cash in his shoe while crossing the border violates the statute. U.S. Br. 47 n.20.

Finally, the Government's reading of the statute depends upon an unnatural interpretation of the term "design" – one that contradicts even the definitions offered by the Government. Each of those definitions refers to a mental state, as in "to conceive

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[2] It bears noting that even for smaller sums of money, the Government's proposed rule is contrary to widely accepted and government-recommended travel practices. The Department of State specifically advises against carrying money in this supposedly "ordinary" fashion when traveling internationally. *See A Safe Trip Abroad*, http://travel.state.gov/travel/tips/safety/safety_1747.html (last visited Feb. 15, 2008) (recommending that travelers carrying cash should "[a]void handbags, fanny packs and outside pockets that are easy targets for thieves. . . . One of the safest places to carry valuables is in a pouch or money belt worn under your clothing.").

[3] The Government's attempt to distinguish *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994), only further demonstrates the weakness of its interpretation. The Government asserts that *Dimeck* did not involve "elaborate measures designed to conceal the location and nature of illegal proceeds from law enforcement." U.S. Br. 45 n.19. But the proceeds in *Dimeck* were concealed in a box – not in a "wallet or purse or pocket" – and thus would appear to satisfy the Government's "unusual measures" test.

and plan out in the mind." U.S. Br. 14 (also defining "design" as "[t]o plan mentally" or "to conceive or fashion in the mind; invent") (citations omitted); Petr. Br. 40 (same). In its brief at the *certiorari* stage, the Government accepted the plain import of those definitions, and agreed that § 1956(a) "makes it an offense to transport money *for the purpose of* concealing or disguising it." Br. Opp. 11 (emphasis added). The Government's reading of the statute now depends on a very different construction of the word "design" – i.e., as pertaining to the physical or structural design of the method of transportation. *See* U.S. Br. 21 ("Congress focused on how the transportation itself was 'designed'"); *cf.* Petr. Br. 39-40. On that view, so long as the transportation method was set up in such a way as to physically hide the proceeds, the transportation has been "designed" to "conceal," and the *purpose* of the transportation becomes wholly irrelevant. Yet again, the Government's reading of the statute cannot be reconciled with its own reading of the statute.

3. In the end, the Government's own summary of its proposed rule aptly captures its flaws: "When the circumstances surrounding a transaction or transportation do not demonstrate it was designed to conceal or disguise *in the relevant sense*, a money laundering conviction will not be supported by the evidence." U.S. Br. 33 (emphasis added). The Government cannot and does not explain, in any coherent or principled fashion, what constitutes a transportation designed to conceal "in the relevant sense." Is it the mere act of transporting illicit funds abroad where they are hard to detect and recover? Is it transporting them in a way that keeps them hidden? Is it tak-

ing extra-special measures, not usually taken by those carrying bulk money abroad, to keep the funds hidden? What measures are special enough? A box? A locked box? A locked box locked in the trunk? The meaning of concealment "in the relevant sense" is a concept known only to the Government – it provides no notice whatsoever to persons who may be subject to the statute, and no guidance to the courts, prosecutors, and juries who must apply it.

The Government does suggest one construction of the statute that makes sense: a violation is shown where "independent evidence establishes that concealment or disguising of a pertinent attribute of the proceeds would occur at the point of destination." U.S. Br. 41. Significantly, it is the only construction the Government proposes that derives from the statute's actual language – specifically, the transportation must have the purpose ("design") of concealing or disguising a "pertinent attribute of the proceeds." This can be the only "relevant sense" of concealment: there must be evidence establishing that the purpose of the transportation was to cleanse the proceeds by concealing one or more of the attributes that expose their illegitimacy, and that the defendant knew of that purpose. Merely transporting illicit funds internationally, or merely hiding them during such transportation, says nothing at all about the purpose of the transportation, much less establishes that the transportation was intended to conceal an attribute of the funds that would expose their illegitimacy.

B. The Statute Requires That Illicit Proceeds Be Transported For The Purpose Of Cleansing Them By Concealing A Listed Attribute

Contrary to the Government's submission, reading the statute to require proof that the purpose of the transportation was to cleanse illicit funds of their taint of criminality by concealing a listed attribute is the only construction that makes sense of the statute's text and structure.

1. *The Text Of § 1956(a) Requires That The Defendant Engaged In Conduct For The Purpose Of Creating The Appearance Of Legitimate Wealth*

The Government's principal objection to petitioner's reading of the text is that the words "appearance of legitimate wealth" "appear nowhere in the statute's text." U.S. Br. 9; *see id.* at 10, 12. That is true but irrelevant. Petitioner does not argue that "creating the appearance of legitimate wealth" is a *separate element* of a money laundering violation. Rather, that phrase simply encapsulates the five attributes listed in the statute, describing in a phrase the type of concealment the statute captures by its specification of those attributes. As Congress correctly perceived, it is those five characteristics, alone or in combination, that betray the illegitimate nature of the proceeds. In short, the appearance of legitimate wealth is not an additional element of proof, but rather directly reflects the concealment element as written.

The Government disputes that the listed attributes of illicit proceeds would reveal their illegiti-

macy, and contends that only concealment of the proceeds' "nature" accomplishes this result. U.S. Br. 16. These arguments are flawed. For example, the Government asserts that "[m]erely revealing the 'location' of funds in a bank account, a safe deposit box, or in the Cayman Islands, for instance, need not also reveal that the funds are criminally derived." *Id.* at 15-16. The Government is incorrect. If – as the statute contemplates – that "location" has been actively concealed as part of a scheme to cleanse dirty money by, for instance, the use of false names or a complex series of transactions, then the true location would contribute to the discovery of the funds' illegitimacy. For example, the location of funds in an offshore account might have been obscured through a convoluted transactional history that made the funds impossible to trace. If authorities were to uncover the location of the funds in the offshore account, in the name of the money launderer, then the location would, at least in part, betray the illegitimacy of the funds.

Similarly, the Government argues that "revealing the 'ownership' or 'control' of funds need not expose their illegitimacy" because "[i]ndividuals engaged in crime can have legally-derived assets also." *Id.* at 16. That is obviously true, but only because those assets are not illegitimate in the first place, and thus there is nothing to reveal. But when a criminal conceals the ownership or control of his *illicit* proceeds, revelation of those attributes would plainly reveal their illegitimacy by exposing the connection between the criminal and the funds. Nor is it true that revealing the "source" of the proceeds "would not necessarily reveal their illegal character." *See id.*

The "source" of illicit proceeds can only be the illicit activities from which they are derived, or persons involved in those activities, and thus would reveal the illegitimacy of the proceeds. In short, the Government's brief does nothing to refute the conclusion that Congress selected the attributes it did because these are the characteristics of illicit proceeds that betray their illegitimacy.

The Government's contrary conclusion rests on an unduly narrow conception of the phrase "appearance of legitimate wealth." The Government misunderstands this phrase to require that relevant concealment activities *affirmatively* indicate the legitimacy of the funds – i.e., effectively advertise to the outside world that the proceeds derive from lawful salary, investment returns, or some other form of "legitimate wealth." But the same result can be achieved by *obscuring the illegitimacy* of the proceeds, so they appear simply to be money of some kind, from some source, with no obvious connection to crime or criminals. Removing the taint of criminality is enough to permit their return to the stream of commerce without notice and without being easily traceable to illegal activity. Court of appeal decisions have recognized that the phrase "appearance of legitimate wealth" encompasses both the positive and the negative methods of reaching the same end. *See, e.g., Dimeck*, 24 F.3d at 1247 ("The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises."); *United States v. Majors*, 196 F.3d 1206, 1212 n.12 (11th Cir. 1999) ("The activity that Section

1956(a)(1)(B)(i) seeks to prevent is the injection of illegal proceeds into the stream of commerce while obfuscating their source.").

Thus, the "drug kingpin who transfers illegal proceeds to the account of his confederate to obscure his role in the crime" (U.S. Br. 16) has indeed engaged in the relevant concealment. Although he has not created the impression that the money derived from a legitimate business enterprise, his actions have removed the taint of criminality from the proceeds by disguising their true source, ownership, and/or control. Each method, no less than the other, creates the appearance that the funds are legitimate. This is so even if the laundering activities "create[] the appearance of having no wealth at all" (*id.* at 17), because the focus is on the appearance of the proceeds themselves, not the apparent wealth of the launderer.

For these reasons, there is no force to the Government's repeated refrain that "[t]he statute does not limit the 'concealment or disguise' element to any one means or method." U.S. Br. 9; *see id.* at 10-11, 15, 20, 21-22, 24, 30. The Government contends that making illicit funds "appear to be legitimate" is a "classic way" of concealing the illegitimacy of funds, but "it is not the only way." *Id.* at 15. This contention confuses the means with the goal. Creating the appearance of legitimate wealth is not one *method* of accomplishing the "object of money laundering" (*id.*), it is the *object itself*.

2. *Petitioner's Reading Is Consistent With The Statute's Overall Structure*

Petitioner's interpretation of the statute is not only compelled by its text, but it also flows logically and necessarily from the overall structure of the statute. As petitioner has shown, "conceal" must mean the same thing in both the transaction and the transportation prongs of the statute. And because a transaction cannot physically hide proceeds, transportation concealment cannot be susceptible of that construction either. Petr. Br. 20-25.

The Government disagrees with both halves of the equation. First, the Government asserts that the "use of a safe deposit box" is a transaction that *can* physically hide money or property. U.S. Br. 18-19. That analogy is flawed. Simply placing illicit funds in a safe deposit box, without more, is not concealment. Were it otherwise, the transaction itself – the "use of a safe deposit box" – would also establish the design to conceal, stripping that element of independent meaning. To constitute concealment, the safe deposit box usage must be accompanied by *additional* concealment activity, such as opening the box under a false name, using another's box, moving the funds between multiple boxes, or otherwise obscuring the illegitimacy, not the existence, of the box's contents. Unsurprisingly, cases on this point – including those the Government cites – involve such additional acts of concealment. *See United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999) (defendant placed drug money in safe deposit box in his wife's name); *United States v. Bowman*, 235 F.3d 1113, 1116 (8th Cir. 2000) (defendant concealed ownership and nature of robbery proceeds by open-

ing and frequently visiting numerous safe deposit boxes following the robberies, "shift[ing]" proceeds "into and out of various other boxes," and "moving the proceeds around so as to make tracking the money difficult"); *United States v. Short*, 181 F.3d 620, 626 (5th Cir. 1999) (defendant asked wife to place drug proceeds in safe deposit box in the name of one of her relatives); *Kiley v. United States*, 260 F. Supp. 2d 248, 272 (D. Mass. 2003) (defendant passed cash through safe deposit box opened by brother into accounts and then investments in brother's name, "allow[ing] [defendant] to invest robbery proceeds without revealing ownership and control of the funds").[4]

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[4] The Government's further efforts to show that "transactions . . . can be designed to conceal attributes of illegal proceeds without making the launderer's wealth appear legitimate" are also off-base. U.S. Br. 19. The Government argues that someone who "transfers illegal proceeds to his offshore account has concealed the location of the proceeds but has created no appearance that they were earned legitimately." *Id.* But the transfer of money to an offshore account only *moves* the funds, satisfying the international transfer element of the statute. It does not conceal their location or any other attribute absent independent evidence of concealment such as opening the account under a fictitious name. Merely depositing money in an offshore account in a transparent and easily traceable fashion is not money laundering, and none of the Government's cases suggests otherwise. *See United States v. Cihak*, 137 F.3d 252, 262 (5th Cir. 1998) (shortly after a co-defendant's conviction, the defendant hastily transferred funds through two domestic banks and then to accounts in Panama and Mexico); *United States v. Abbell*, 271 F.3d 1286 (11th Cir. 2001) (defendants passed on large sums of money from drug kingpin to his arrested employees and their families, where kingpin had taken numerous other steps to distance himself from those employees).

Second, the Government contends that even if the transaction prong requires more than physical concealment, the same result does not follow for the transportation prong. *See* U.S. Br. 20. According to the Government's logic, the "context of a phrase matters," and "[b]ecause of its essentially spatial nature, a 'transportation' of funds is more likely to be designed to conceal, at a minimum, the 'location' of illegal proceeds and may less often be designed to conceal the 'nature' or 'source' of the proceeds." *Id.* at 20. Of course context matters, and had Congress given some indication in the transportation prong that it meant the concealment element to encompass the mere physical hiding of funds, then there might be some support for the Government's position. But there is *no* evidence for that proposition, and as discussed in Part I.A. above, it makes no sense. That Congress chose the same phrase in both the transaction and transportation prongs eliminates any possibility that it meant to capture two different kinds of concealment.

In the end, the Government is left to complain that petitioner's reading should not be adopted because prosecutors would find it harder to win convic-

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It is likewise incorrect that a bank account physically hides proceeds "and thus can 'conceal' attributes of funds without also disguising the funds as 'legitimate wealth.'" U.S. Br. 19-20. A bank account used in a routine fashion cannot hide proceeds because bank records would readily disclose their location. And once again, the transaction – i.e., the deposit of funds into the account – cannot also serve to satisfy the concealment element. Evidence of additional concealment efforts, like using a fictitious name to conceal the ownership of the funds, is required.

tions in international transportation money laundering cases. *Id.* at 21. No canon of construction directs courts to interpret ambiguous criminal statutes to make convictions easier to obtain. The rule is just the opposite. *See infra* Part I.E. In any event, many if not most of the same cases could be brought under the BCS statute. That the Government will have to be more selective in deciding which cases to prosecute as money laundering and which to prosecute as bulk cash smuggling is no reason to reject the only interpretation of § 1956(a) that is consistent with its terms.

C. Petitioner's Reading Of § 1956 Is Confirmed By The Legislative History

The Court need not resort to legislative history to divine the clear meaning of § 1956(a)(2). But to the extent it is relevant, the legislative history refutes the Government's position.

1. In advocating its expansive view of the money laundering statute, the Executive Branch is now asking this Court to grant what the Legislative Branch denied: a statute defining essentially any movement of unlawful proceeds as "money laundering." As discussed in petitioner's opening brief (at 29-31), every initial proposal would have defined money laundering to include any transaction involving unlawful funds. Yet Congress – while simultaneously broadening the statute to reach the act of moving money internationally – *narrowed* the statute to reach only transactions or international transportations undertaken for the purpose of concealing certain attributes of the proceeds. ———

Rather than grappling with – or even acknowledging – that legislative choice,[5] the Government instead focuses on a handful of individual comments that, the Government argues, show Congress really wanted to define money laundering as secreting money out of the country. But the relevant question is not how many members of Congress would have preferred one reading or the other. Rather, the inquiry turns on what Congress as a whole ultimately *did*. The legislative background shows that the Government wanted Congress to define "money laundering" to include any and all international shipment of unlawful funds. *See* Petr. Br. 29-31. And Congress as a whole chose to adopt a different proposal.

Indeed, the Government itself notes that, as compared to initial proposals, the enacted version of § 1956(a)(2) "took 'a qualitatively different approach' to 'the *nature* of the transactions that it covers' by 'applying its coverage to those transactions that can be said to constitute the *core* of money laundering – transactions designed to conceal or disguise the nature, location, source, ownership, or control of criminal proceeds.'" U.S. Br. 32 (emphasis added) (quoting S. Rep. No. 99-433 (1986)). The Government's effort to explain the difference between the proposed broad version and the enacted narrow version is nothing but a dodge: the change makes sense, the Government urges, because under the more restrictive statute adopted, a conviction will not lie when "the circumstances surrounding a transaction or

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[5] Notably absent from the hypothetical statutes conjured by the Government (U.S. Br. 30-31) are the specific alternatives Congress had before it when it enacted § 1956.

transportation do not demonstrate it was designed to conceal or disguise *in the relevant sense*." U.S. Br. 33 (emphasis added). As shown above, however, the Government ultimately has no coherent theory to explain what concealment "in the relevant sense" means. And under the theory of "concealment" the Government does advance, every international transportation of illicit funds is, in practice, a prohibited concealment – *precisely* the statute Congress chose *not* to adopt.[6]

2. Even the snippets of legislative debate cherry-picked by the Government do not support its view of the statute. For example, the Government asserts that the Senate Report accompanying § 1956's final version "defined the physical transportation of cash into and out of the United States as 'laundering' activities in and of themselves." U.S. Br. 29. In making that assertion, the Government relies on a statement in the Senate Report that § 1956(a)(2) "'covers situations in which money *is being laundered by* transferring it into the United States as well as those in which money *is being laundered by* transferring it out of the United States.'" *Id.* (quoting S. Rep. No. 99-433, at 11). Even read in total isolation, that sentence is, at best, equivocal: it might mean that any international shipment of unlawful funds is money laundering and covered by § 1956(a)(2); but it might mean that the statute covers international

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[6] The Government cites a string of cases for the proposition that not every transaction or transportation will trigger a finding of concealment under its view of the statute. U.S. Br. 33 n.12. Tellingly, none of those cases involved the transportation prong.

shipments of dirty money when part of a "launder[ing]" scheme.

Read in context, the sentence plainly means the latter. Immediately following that excerpt, the Senate Report explains that § 1956(a)(2)'s final text "avoid[ed] . . . pitfalls of" the administration's proposal. S. Rep. No. 99-433, at 11. Specifically, whereas the administration's bill "would have been triggered by the mere receipt of property," the legislation Congress adopted "requires that the accused defendant engage in an act of transporting . . . *and* either intend to facilitate a crime," as required under the promotion prong, "or know that the transaction was designed to conceal a crime," as required under the concealment prong. *Id.* (emphasis added). The Senate Report thus makes clear that physical transportation of cash out of the United States by itself is *not* money laundering; the Government must *also* prove the defendant knew the transportation was for a specifically enumerated purpose.

The Government fares no better in relying on its own testimony – in support of its failed proposal – that "criminal organizations . . . wash their own illegally generated money by such relatively crude methods as one of their members' smuggling a suitcase full of currency out of the country for deposit in an offshore bank." *See* U.S. Br. 27-28 (quoting *Money Laundering Legislation: Hearing on S. 572, S. 1335, and S. 1385 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 57 (1985) (statement of Stephen S. Trott, Assistant Attorney General, Criminal Division)). Even if smuggling unlawful money internationally *"for deposit in an offshore bank"* contravenes § 1956(a)(2), the Government's

position appears to be – and, in fact, must be if petitioner's conviction is to stand – that the international transportation of money *itself* is money laundering, perhaps so long as the money is (as it invariably will be) physically hidden during transit. Not even its own congressional testimony supports this view.

3. Finally, if, as the Government asserts, § 1956 is actually intended to provide law enforcement a "tool[]" for preventing criminals from hiding unlawful proceeds from authorities, then it is oddly ill-suited to the task. *See* U.S. Br. 30 ("Congress's concern was that . . . law enforcement needed better tools to find and seize illegal proceeds *no matter how* criminals sought to conceal or disguise them."); *id.* at 31 (international transportation "frustrate[s] the ability of law enforcement to find the money").[7] Although secreting money out of the country is one way in which criminals might try to hide it from domestic law enforcement, it is neither the only way nor the most obvious. A criminal can "conceal" unlawful funds from law enforcement in any number

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[7] The Government claims this purported purpose is "reinforced by one of the stated purposes of Section 1956(a)(2) – 'to obtain international cooperation to halt the flow of drug money.'" U.S. Br. 31 (quoting S. Rep. No. 99-433, at 11). While international cooperation has been highlighted as necessary to combat money laundering, *see* 2007 Nat'l Money Laundering Strategy ("2007 Strategy"), at 11-12, *available at* http://www.ice.gov/doclib/pi/ financial/2007nmls.pdf, it is necessary *precisely because* authorities need to know what will happen (or what did happen) after the proceeds have crossed the border. If physical concealment at the border were sufficient, more and better-trained border patrol agents could do the job without international assistance.

of less intricate ways, such as hiding it inside a mattress or burying it in his backyard. Yet none of that conduct would come within § 1956(a) because it does not involve a transaction or international transportation. If Congress wanted to define the hiding of unlawful funds as money laundering, it would have simply done so, and not bothered with the need for a transaction or transportation.

The only legislative purpose that can be reconciled with § 1956(a)'s *text* is a desire to focus on the *cleansing* of dirty money – either through domestic transactions designed to conceal, or by moving the money internationally so that it may be more easily laundered overseas. And the only coherent way to read § 1956(a)(2) is as prohibiting the international shipment of cash undertaken for the purpose of concealing one of the listed attributes, which are the attributes that betray unlawful proceeds' illegitimacy.

D. The Bulk Cash Smuggling Statute Shows That Congress Did Not Construe The Money Laundering Statute As Broadly As The Government Does

The Government disputes the relevance of the BCS statute here by misconstruing both petitioner's argument and the statute itself. Petitioner does not argue that because he might have been charged under the BCS statute he should not have been charged under the money laundering statute, nor does he argue that the statutes impermissibly overlap. U.S. Br. 36. Instead, the BCS statute is relevant here because it demonstrates that Congress perceived a *gap* in the money laundering scheme for the act of smuggling illicit proceeds across the bor-

der, and enacted the BCS statute to fill that gap. Petr. Br. 33-35.

Congress's understanding of the limits of § 1956(a)(2) is made clear in the legislative findings written into the BCS statute itself, which describe the statute as a necessary "deterrent to the laundering of criminal proceeds," particularly "in cases where the only criminal violation under current law is a reporting offense." Pub. L. No. 107-56, § 371(a)(6), 115 Stat. 272, 336 (2001). As then-Assistant Attorney General Michael Chertoff elaborated:

> [H]undreds of millions of dollars in U.S. currency representing drug proceeds, as well as proceeds of other criminal offenses, are transported out of the United States each year in shipments of bulk cash. *The only law enforcement weapon currently available to combat this activity is a requirement that shipments of more than $10,000 in cash be accompanied by a report to the United States Customs Service.*

Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H. Comm. on Financial Services, 107th Cong. (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division) (emphasis added); *see The Administration's National Money Laundering Strategy for 2001: Hearing Before the S. Comm. on Banking, Housing & Urban Affairs*, 107th Cong. (2001) (statement of Rep. LaFalce) ("Currently, the couriers of illicit cash are subject to only minimal jail sentences for failing to file currency reports.").

The Government claims the BCS statute is inapposite because it "does not purport to deal with cases where the government can show that the proceeds were illegal and the defendant knew that fact." U.S. Br. 11. The suggestion that the BCS statute was not intended to target illicit proceeds in general, and drug trafficking proceeds in particular, is incorrect. The legislative statements just cited show that Congress was concerned with illicit proceeds, and the statute's own legislative findings again make the point expressly. Those findings declare that the target of the statute is "drug dealers and other criminals," Pub. L. No. 107-56 § 371(a)(1), (2), and they continue:

> The arrest and prosecution of bulk cash smugglers are important parts of law enforcement's effort to *stop the laundering of criminal proceeds*, but the couriers who attempt to smuggle the cash out of the United States are typically low-level employees of large criminal organizations, and thus are easily replaced.

Id. (a)(5) (emphasis added). In short, the BCS statute was needed because Congress believed the "penalties for violations of the currency reporting requirements [were] insufficient to provide a deterrent to the laundering of *criminal proceeds*." *Id.* (a)(6) (emphasis added). *See also* 2007 Strategy at v ("Bulk cash smuggling is *most often associated with illegal narcotics*.") (emphasis added).

The foregoing also demonstrates the error in the Government's claim that petitioner's conduct here was more "culpable" than the conduct targeted by

the BCS statute because it involved "drug trafficking proceeds." U.S. Br. 37. As the legislative background of the BCS statute shows, the fact that petitioner's conduct involved drug trafficking proceeds means it was *exactly* the type of conduct targeted by the BCS statute.[8]

E. If Any Room For Doubt Remained, The Rule Of Lenity Compels A Narrow Construction Of The Statute

The Government's inability to produce a coherent and principled theory of what constitutes concealment "in the relevant sense" belies its contention that the Government's interpretation reflects the "plain" meaning of the statute. By contrast, petitioner's view fully reconciles the words, structure, context, and background of the statute. To that extent, petitioner agrees that the rule of lenity need not be applied. *See Castillo v. United States*, 530 U.S. 120, 131 (2000) (the rule of lenity applies only if ambiguity remains "after considering traditional interpretive factors"). But if, after employing all the ordinary tools of construction, there is any remaining doubt about the statute's meaning – and, in particular, if the Government has not shown its alternative construction to be *clearly superior* to petitioner's

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[8] The Government complains that it is "questionable" that it could have proven a BCS violation since petitioner was stopped short of the border. But the Government has charged – and convicted – defendants under similar circumstances. *See United States v. Gonzalez*, 2007 WL 1793571 (M.D. Ala. June 19, 2007) (charging defendant under § 5332 for attempting to smuggle over $100,000 to Mexico after being stopped far from the border in Montgomery, Alabama) (subsequent guilty plea available at 2007 WL 2468753 (M.D. Ala. July 2, 2007)).

reading – the rule of lenity compels adoption of petitioner's construction: "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (where "text, structure, and history fail to establish that the Government's position is unambiguously correct," rule of lenity is applied to "resolve the ambiguity in [defendant's] favor").[9]

The Government's suggestion that the rule has its "greatest force" when the broader reading might capture otherwise innocent conduct (U.S. Br. 39) is of no consequence. Even if the rule has *greater* force in that situation, no precedent has ever suggested that the rule *lacks* force when the underlying conduct might still be culpable in some other way. To

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[9] The Government submits that the rule of lenity applies only in cases of "grievous ambiguity." U.S. Br. 39 (quoting *Muscarello v. United States*, 524 U.S. 125, 139 (1998)). Its reliance on *Muscarello*'s restrictive language overlooks several of this Court's other recent formulations of the rule that require no more than ordinary ambiguity in order for the rule to apply. *See, e.g.*, *Scheidler*, 537 U.S. at 409 (rule applies whenever there are "two rational readings"); *Castillo*, 530 U.S. at 131 (rule applies when Court is "genuinely uncertain" about meaning); *James v. United States*, 127 S. Ct. 1586, 1603 (2007) (Scalia, J., dissenting) (rule applies when statute is capable of more than one reasonable construction); *Fischer v. United States*, 529 U.S. 667, 691 (2000) (Thomas, J., dissenting) ("[T]o the extent that there is any ambiguity in [a statutory term], we should resolve that ambiguity in favor of the defendant.").

the contrary, the rule applies even to the construction of criminal penalties, which by definition involve conduct that is not "innocent." *See Bifulco v. United States*, 447 U.S. 381, 387 (1980).[10] Accordingly, even though transporting the proceeds of criminal activity abroad may be blameworthy conduct, any ambiguity in the statute enacted to criminalize that conduct must be resolved in favor of petitioner.

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[10] The policies underlying the rule explain why it applies to the construction of statutes implicating non-innocent conduct. First, the rule is based on the need to provide "fair warning . . . to the world" of what is criminalized. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). A "fair warning" must include not only notice that the conduct is wrongful, but also the extent of the penalties that may be imposed. *See Bifulco*, 447 U.S. at 387. Second, the rule of lenity assures that definition of crimes takes place in the legislature, not the judiciary. *See, e.g., United States v. Bass*, 404 U.S. 336, 348 (1971) ("This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." (quotation omitted)); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("the power of punishment is vested in the legislative, not in the judicial department"). Third, the rule serves to "minimize the risk of selective or arbitrary enforcement" by prosecutors. *United States v. Kozminski*, 487 U.S. 931, 952 (1988). That danger is present – even exacerbated – when the underlying conduct is non-innocent, because construing a statute broadly to encompass conduct already criminalized by another statute only enhances the opportunity for abuse.

II. BECAUSE THERE IS NO EVIDENCE THAT PETITIONER KNEW THAT THE PURPOSE OF HIS TRIP WAS TO CONCEAL LISTED ATTRIBUTES OF ILLICIT FUNDS, HIS CONVICTION MUST BE REVERSED

Unsurprisingly, the Government's purported test would permit petitioner's conviction to stand – just as it would permit a conviction for virtually *any* international transportation of illicit proceeds. Judged under the proper standard, however, petitioner's conviction must be reversed because there is no evidence – much less proof beyond a reasonable doubt – that he knew the purpose for which the money was being transported.

The court below affirmed petitioner's conviction based almost entirely on evidence concerning the method of transportation, rather than on any evidence establishing the purpose of the transportation. As the en banc dissent explained, "The government did not prove or even attempt to prove anything about what Cuellar planned to do with the money once he reached his destination; the prosecution showed only that he was concealing the money to transport it." Pet. App. 25a.

In response, the Government implicitly concedes that it has no evidence concerning the plans for the proceeds in Mexico. Instead the Government relies primarily on facts showing that petitioner intended to cross the Mexican border with the proceeds hidden in his vehicle. *See* U.S. Br. 43 (noting "petitioner's admitted destination of Mexico, [and] the elaborate measures taken to convert the rear portion of the Beetle into a secret cargo compartment").

Such evidence may prove that petitioner was attempting an international transportation with the proceeds, but it says nothing about the purpose of that transportation. That leaves only the evidence that petitioner knew little about the owner of the cash – except for his name, the most critical fact. Pet. App. 11a. That evidence, too, does nothing to establish that the trip to Mexico was designed to cleanse the funds of their criminal taint by concealing their location, ownership, source, or control. Indeed, the Government's *own expert witness* testified petitioner was a drug-smuggling courier, whose hidden money would be used to pay off a supplier in the drug-smuggling chain. Petr. Br. 45. A plan to pay off a supplier cannot be a plan to conceal money – unless a "design to conceal" means a design to do *literally anything*.

But that of course is exactly how the Government construes the phrase: "Whatever is done with the illegal proceeds in Mexico . . . they have been surreptitiously moved to a location where United States law enforcement authorities are impaired from detecting and intercepting them." U.S. Br. 46. There could be no clearer statement of the Government's view that *all* international transportations of illicit funds are criminalized by § 1956(a)(2). And there thus could be no clearer statement of why the Government's construction of the statute cannot be correct. Petitioner's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, and remand for the district court to enter a judgment of acquittal.

Respectfully submitted,

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IN THE

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HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a conviction for money laundering under 18 § U.S.C. § 1956(a)(2).

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2007 National Money Laundering Strategy, available at http://www.treas.gov/press/releases/docs/nmls.pdf (last visited Dec. 13, 2007) 14

Adam K. Weinstein, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369 (Winter 1988) 4

Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151 (2006) 6

Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517 (2005) 15

John K. Villa, *Banking Crimes* (2001) 9, 14

Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703 (1993) 6

Mariano-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003) ..... *passim*

Mary McNamara, Edward W. Swanson, & Alexis Haller, *Money Laundering: How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited Dec. 13, 2007) 12, 13

NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited Dec. 13, 2007) 2

Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* (3d ed. 2000) 4

Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721 (2003) 5

Scott J. Golde & Winston E. Calvert, *A Practitioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312 (2006) 5

Teresa E. Adams, Notes & Comments, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531 (2000) 13

Tracy Tucker Mann, *Money Laundering: Twenty-Second Survey of White Collar Crime*, 44 Am. Crim. L. Rev. 769, 777–78 (2007) 11, 12

United States Sentencing Guidelines Manual (2006) 14

IN THE
Supreme Court of the United States

No. 06-1456

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. Consistent with these goals, NACDL has previously criticized illogical and improper judicial expansions of the money laundering statute at issue in this case, 18 U.S.C. § 1956.[2] Amicus also highlighted the legal problems and practical consequences of expansive interpretations of § 1956 in its brief in support of Respondents in *United States v. Santos*, No. 06-1005, for which this Court held oral argument on October 3, 2007.

INTRODUCTION

Amicus agrees with Petitioner that merely hiding funds with no design to create the appearance of legitimate wealth is insufficient to support a money laundering conviction. Amicus submits this brief to elaborate on the reasons why, in its view, the expansive interpretation of the "conceal or disguise"

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[2] *See* NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited Dec. 13, 2007).

clause of the principal federal money laundering statute, 18 U.S.C. § 1956(a), given by some courts of appeals conflicts with the plain language and meaning of that statute. Amicus writes principally to explain how the increased and continued expansion of the money laundering statute has real and detrimental effects on the rights of criminal defendants and on the enforcement of the money laundering statutes.

The expansive and unwarranted interpretation adopted by the Fifth Circuit below, and by the Second, Third, and Eleventh Circuits in analogous circumstances, improperly expands the scope of an already broad statute far beyond its intended reach. Section 1956 has become a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct, without any showing of the aggravated societal harm that the money laundering statute was designed to redress. If this over-expansive interpretation is allowed to stand, criminal defendants unjustly will face longer sentences and will be forced to weigh the potential for such sentences in considering whether to plead guilty.

These grave concerns regarding the scope of the money laundering statute militate strongly in favor of reversal. Amicus respectfully requests that this Court restore the meaning of "conceal or disguise" in § 1956 to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF "CONCEAL OR DISGUISE" EXPANDS 18 U.S.C. § 1956 BEYOND CONGRESS'S INTENT AND FOSTERS UNJUST RESULTS.

A. The Money Laundering Statute Is Subject to Expansive Interpretations That Invite Prosecutorial Over-Reliance.

The Money Laundering Control Act of 1986 ("MLCA"), *codified at* 18 U.S.C. §§ 1956–1957, was the first federal statute to criminalize money laundering per se. *See* Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369, 372–73 (Winter 1988). As enacted, the MLCA was and is a powerful tool for prosecutors. Compared with RICO and various criminal conspiracy statutes, prosecutors can bring cases relatively easily under § 1956, and its long list of predicate offenses facilitates convictions.[3] *See, e.g.*, Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* 397 (3d ed. 2000).

Although the scope of the MLCA was broad when enacted, many courts since have interpreted

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[3] Section 1956(c)(7) provides a lengthy list of offenses that qualify as "specified unlawful activity," including the definition of racketeering found in § 1961(1) (which includes, *inter alia*, mail and wire fraud).

the statute to capture conduct substantially beyond traditional money laundering. *See* Scott J. Golde & Winston E. Calvert, *A Practioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312, 312 (2006) ("The federal statutes not only cover the classic money laundering scenario where an individual takes steps to make illegally earned assets appear legitimate, they also affect a far broader range of conduct that many would not consider 'laundering' money."); Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721, 723 (2003) ("The scope of the MLCA can be rather broad. In fact, the statute can reach so far as to impose liability on individuals, such as attorneys, who were not originally involved in any illegal activity, but later became involved in post-illegal activity." (footnote omitted).

Prosecutors accordingly may seek to "tack on" money laundering charges where the alleged "laundering" conduct is incidental to or virtually indistinguishable from the underlying offense. More broadly, they may seek to use the money laundering statutes to punish conduct well beyond those statutes' proper realm. *See* Mariano-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 406 (2003) ("People committing federal offenses that can be predicates for money laundering (such as drug trafficking), for example, can now be charged with money laundering for doing almost anything in the world with money from

specified unlawful activity, because of the watered down interpretations of the anti-money laundering statutes."); *see also* Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151, 152 (2006) ("While being a leader in fighting money laundering activity, the U.S. Department of Justice has used new statutes creatively to expand prosecutorial power beyond its intended purpose."). So broad is the money laundering statutes' potential scope that legitimate conduct may be threatened. *See* Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703, 723 (1993) ("[A]dditional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions.").

B. Many Courts Consistently Have Expanded Specific Terms of 18 U.S.C. § 1956, Encouraging Broad, Unintended, and Unfair Applications of the Statute.

As Petitioner's brief demonstrates, the principal federal money laundering statute, 18 U.S.C. § 1956, and in particular its "conceal or disguise" prong,[4] have been interpreted more broadly than Congress intended. *See* Pet'r Br. 28–32.

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[4] A defendant may be convicted under § 1956(a)(1) or (a)(2) if it is shown, *inter alia*, that the defendant knew the transaction, (a)(1), or the international transportation, (a)(2), was "designed in whole or in part—to conceal or disguise the nature, the

"Conceal or Disguise." Many courts—including the Fifth Circuit in the decision below—have adopted extraordinarily expansive constructions of the phrase "conceal or disguise," interpreting it to encompass the mere hiding of funds.

For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without evidence that the cash transportation was designed to give the appearance of legitimate wealth. *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006), *petition for cert. filed*, June 1, 2007 (No. 06-1604); *see also United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) (attorney's placement of client's illicitly-obtained cash into personal briefcase, which he attempted to transport by car to his law office, satisfied concealment prong); *United States v. Hurtado*, 38 F. App'x. 661 (2d Cir. 2002) (facts indicating only that money being transported into the United States was hidden in luggage bags, without evidence that the transportation was meant to make the money appear legitimate, sufficed to show a violation of § 1956). Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. *See United States v. Posters 'N'*

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location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *See also* §1956(a)(3)(B).

Things Ltd., 969 F.2d 652, 661 (8th Cir. 1992), (deposit by "head shop" owner of shop proceeds into business account), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling proceeds into family business account bearing defendant's name); *see also United States v. Shepard*, 396 F.3d 1116, 1121 (10th Cir.) ("[D]epositing illegal proceeds into the bank account of a legitimate business may support the inference of an intent to conceal."), *cert. denied*, 545 U.S. 1110 (2005).

"Financial Transaction." The breadth with which some courts have construed the term "conceal" is illustrative of a larger trend among the federal courts to interpret provisions in § 1956 in an expansive fashion. For example, to be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, *inter alia*, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. *See, e.g.*, *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money to courier "involved the movement of funds by wire or other means" (alteration and quotation omitted); *United States v. Wydermyer*, 51 F.3d 319, 326–27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by wire or other means" (emphasis and quotations omitted).

According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." 1 John K. Villa, *Banking Crimes* § 8:10 at 8–33 (2007). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use § 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Cuellar, *supra*, at 348.

"Proceeds." As an additional element of a money laundering offense, § 1956(a)(1) requires proof that the defendant knew the property involved in the financial transaction was the *proceeds* of specified unlawful activity. Although the statute does not define this term, some courts have interpreted it broadly. *See United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (defining "[p]roceeds" as "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue." (quotations omitted)). Contrary to the plain language of the statute, "proceeds" has even been held to include worthless items. *See United States v. Akintobi*, 159 F.3d 401, 403–04 (9th Cir. 1998) (holding that, although the term "may refer to

something of value," it "has the broader meaning of that which is obtained . . . by any transaction," and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed" (quotations omitted)); *see also United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included a "fraudulently obtained line of credit, which results in an artificially inflated bank balance").

Some circuits also have interpreted "proceeds" to include gross receipts of the specified criminal activity rather than only the net income of that activity; consequently, they construe the statute broadly to prohibit reinvestment of gross receipts as expenses of the criminal enterprise. *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir.), *cert. denied*, 543 U.S. 978 (2004); *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004), *vacated and rev'd on other grounds*, 544 U.S. 945 (2005), *reinstated in relevant part*, Nos. 03-1441 & 03-1442 (May 20, 2005). *But see Santos v. United States*, 461 F.3d 886, 893–94 (7th Cir. 2006). The Court recently granted certiorari to resolve the circuit split on this issue in *United States v. Santos*, No. 06-1005 (cert. granted Apr. 23, 2007), which was argued on October 3, 2007.[5]

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[5] The oral argument in *Santos* included the following exchange:

> Justice Alito: "Mr. Roberts, isn't it true that the problems that are being highlighted are problems that result from expansive interpretations of other concepts that are not

"Willful Blindness." Additionally, Circuits have interpreted § 1956 as allowing for conviction premised on "willful blindness" to the specified illegal activity. *See United States v. Flores*, 454 F.3d 149, 155–56 (3d Cir. 2006) (holding willful blindness sufficient for conviction); *United States v. Epstein*, 426 F.3d 431, 440 (1st Cir. 2005) (same). *But cf. United States v. Sayakhom*, 186 F.3d 928, 943 n.8 (9th Cir. 1999) (explaining that prosecution must prove more than the defendant "should have known"). *See generally* Tracy Tucker Mann, *Money Laundering: Twenty-Second Survey of White Collar Crime*, 44 Am. Crim. L. Rev. 769, 777–78 (2007) (collecting cases). This despite the statute's plain language requiring actual knowledge of illegality. *E.g.*, 18 U.S.C. § 1956(a) ("Whoever, *knowing* that the property involved in a financial transaction represents the proceeds of some form of unlawful activity . . . ." (emphasis added)); *see* Mann, *supra*, at 777 ("Sections 1956 and 1957 require actual knowledge, which is a more stringent standard than

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before us here, expansive interpretation of promotion, expansive interpretation of concealment? The Seventh Circuit in the first appeal in this case interpreted promotion very broadly. And then, I guess it felt that it had boxed itself in and that's what led to this interpretation of proceeds. But if you interpret those other concepts more narrowly, you don't have the same kind of overlap." Mr. Roberts: "I agree with that, Your Honor."

Transcript of Oral Argument at 7–8, *United States v. Santos* (U.S. Oct. 3, 2007) (No. 06-1005).

'should have known' or 'reckless disregard.' However, some courts have weakened this requirement . . . ." (footnote omitted)).

Through such expansive interpretations of terms that otherwise would appear to limit application of the statute,[6] many courts now punish as "money laundering" conduct that bears virtually no relation to that concept as it is commonly understood. *See United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem . . . doomed to failure." Mary McNamara, Edward W. Swanson, & Alexis Haller, *Money Laundering: How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited Dec. 13, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of §§ 1956 and 1957 should not obscure the prevailing pattern in

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[6] *See also United States v. Valuck*, 286 F.3d 221, 226 (5th Cir. 2002) (announcing that the Fifth Circuit "subscribes to a broad interpretation of the word 'promote' within the context of section 1956"); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997) (concluding that *United States v. Lopez*, 514 U.S. 549 (1995), "did not elevate the government's burden under the money laundering statute," and that "[t]he government need only prove that the individual subject transaction has, at least, a de minimis effect on interstate commerce").

the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, *supra*, at 343.[7]

Interpreting "conceal or disguise" consistent with the statutory language and intent would not solve all of these issues, but it would be a step in the right direction of restoring the money laundering statutory scheme to its intended scope.

C. Expansive Interpretations of § 1956 Have Significant Negative Ramifications for the Criminal Justice System.

These concerns are not merely abstract. An overbroad reading of the principal federal money laundering statute has severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole.[8]

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[7] Compounding the problem, the *United States Attorneys' Manual* imposes limited obligations on prosecutors to notify the Department of Justice before pursuing money laundering charges, "in sharp contrast to even the broadly interpreted and applied RICO statutes which require authorization prior to prosecution under any circumstances." Teresa E. Adams, Notes & Comments, *Tracking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531, 569 (2000) (citing *U.S. Attorneys' Manual* §§ 9-105.310–.330, 9-110.101).

[8] In the most recent year for which statistics are available, nearly one thousand defendants were convicted under § 1956—62% of all defendants convicted of money-laundering related crimes in the federal system. *See 2007 National Money Laundering Strategy* 94 tbl. 16 (App. B), *available at*

Section 1956 comes with harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[ ] offense levels for money laundering more closely to the underlying conduct," *U.S. Sentencing Guidelines Manual* app. C, amend. 634, reason for amend., Vol. II at 781 (2006), even today money laundering charges can result in a sentence far greater than that for the predicate offense alone when the predicate offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); *see also* Cuellar, *supra*, at 348–49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants").[9] Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense,

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http://www.treas.gov/press/releases/docs/nmls.pdf (last visited Dec. 13, 2007) (citing Dep't of Justice Office of Policy and Legislation, Crim. Div. (FY 2004)).

[9] As explained below, even though Petitioner Cuellar's predicate conduct was drug-related, had he been convicted under the bulk money smuggling statute, 31 U.S.C. § 5332 (under which he was not even charged, *see United States v. Cuellar*, 478 F.3d 282, 300 n.10 (5th Cir. 2007) (en banc) (Smith, J., dissenting))—the charge most directly applicable to his conduct—he would have faced a statutory maximum one-fourth that of § 1956.

even if no other sentencing enhancements apply. U.S.S.G. § 2S1.1(b)(2)(B).

In white-collar criminal cases, in particular, the prospect of higher sentences allows prosecutors to extract plea bargains and forfeitures that might not otherwise be forthcoming and that may well not be in the interest of justice. *See* Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534–35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks a heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to use it as a bargaining chip in pretrial conferences. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused—and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place (i.e., "traditional" money laundering). Instead, prosecutors and courts have interpreted § 1956 to embrace conduct—as here, "concealment" in an automobile—that comes nowhere close to presenting the dangers to society that the money laundering

statute was designed to address. Defendants, including Petitioner here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

The continued broad and improper application of § 1956 has real-world consequences for defendants convicted under it, as well as for defendants threatened with money laundering charges. The Fifth Circuit's expansion of § 1956 in this case, if affirmed, would further increase prosecutorial power at the expense of fairness.

II. MANY DEFENDANTS WHO SUFFER OVERBROAD APPLICATION OF § 1956 WOULD BE SUBJECT TO PROSECUTION UNDER OTHER CRIMINAL STATUTES IN ANY EVENT.

If this Court reversed the Fifth Circuit's decision, it would not deprive the government of the means to punish international financial crimes. On the contrary, given the numerous other money laundering statutes, cash reporting statutes, and anti-smuggling statutes,[10] "there is already no

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[10] In addition to §§ 1956 and 1957, these include 18 U.S.C. § 1960 (prohibition of illegal money transmitting businesses); 18 U.S.C. § 982 (criminal forfeiture after conviction under, *inter alia*, §§ 1956, 1957, 1960); 31 U.S.C. § 5313 (reports on domestic coin and currency transactions); 31 U.S.C. § 5316 (reports on exporting and importing monetary instruments); 31 U.S.C. § 5317 (search and forfeiture of monetary instruments); 31 U.S.C. § 5324 (structuring transactions to evade reporting

shortage of *in terrorem* tools at prosecutors' disposal." *Blakely v. Washington*, 542 U.S. 296, 311 (2004).

Petitioner's case is illustrative. As the dissent in the Fifth Circuit pointed out, and as Petitioner himself has conceded, Cuellar's conduct is squarely captured by the bulk cash smuggling statute, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it. *See United States v. Cuellar*, 478 F.3d 282, 299–300 (5th Cir. 2007) (en banc) (Smith, J., dissenting) (explaining that the legislative history of § 5332 demonstrates that Congress did not intend § 1956 to capture conduct such as petitioner Cuellar's). If charged under § 5332, Cuellar would have faced a statutory maximum of five years in prison. Instead, having been accused and convicted of "money laundering," Cuellar was exposed to a twenty-year statutory maximum sentence under § 1956.[11]

* * *

Amicus does not dispute the need for an anti-money laundering strategy, or for an anti-money laundering statutory scheme. Rather, Amicus contends that the breadth of § 1956, as interpreted

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requirement prohibited); 31 U.S.C. § 5332 (bulk cash smuggling into or out of the United States).

[11] Petitioner was sentenced to a term of seventy-eight months, with supervised release of three years immediately following. J.A. 4.

by the Fifth Circuit, does not conform to the language of the statute or to Congress's intent and leads to unintended and unfair results. This Court should therefore reverse the judgment below.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Cuellar's request that this Court reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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